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Supreme Court, U.S.
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No. 10-827

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In the

Supreme Court of the United States

UNITED STATES OF AMERICA *ex rel.*
SALLY CHRISTINE SUMMERS,
Petitioner,

v.

LHC GROUP, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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December 21, 2010

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QUESTION PRESENTED FOR REVIEW

Did not the Sixth Circuit err in holding that the sealing provisions of the False Claims Act are absolute, and no balancing test concerning inadvertent, unavoidable violation of those provisions is permissible?

LIST OF ALL PARTIES TO THE PROCEEDINGS

Including Rule 29.6 Corporate Disclosure Statement

Sally Christine Summers, the Relator

The United States of America

LHC Group, Inc., the Defendant

Supreme Court Rule 29.6 does not require a Corporate Disclosure Statement from Petitioner, in that she is not a corporation.

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The Opinion of the Court of Appeals is reported at 623 F.3d 287 and reproduced in the Appendix at 1a-32a. The Memorandum Opinion of the District Court has not been officially reported but is available at 2009 WL 1651503 and is reproduced in the Appendix at 33a-51a.

CONCISE STATEMENT FOR THE BASIS OF UNITED STATES SUPREME COURT JURISDICTION

The United States Supreme Court has jurisdiction over the appeal of this controversy by virtue of Title 28 U.S.C. § 1254(1). The judgment of the United States Court of Appeals for the Sixth Circuit is dated October 4, 2010. There was no application for rehearing.

I.

STATUTE INVOLVED

The False Claims Act, Title 31 U.S.C. § 3730(b)(2):

> "A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government pursuant to Rule 4(d)(4) of the Federal Rules of Civil Procedure. The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. The Government may elect to intervene and proceed with the action within 60

days after it receives both the complaint and the material evidence and information."

II.

STATEMENT OF THE CASE, (Including the Basis For Federal Jurisdiction in the Court of First Instance)

The United States District Court for the Middle District of Tennessee – the Court of First Instance – had jurisdiction over this controversy by virtue of the False Claims Act, which is codified at Title 31 U.S.C. § 3729 *et seq*. As a consequence, this case presented a federal question within the meaning of Title 28 U.S.C. § 1331.

Beyond that, the only "facts material to the consideration of the questions presented" within the meaning of Supreme Court Rule 14[g] are those articulated by the Sixth Circuit in the fourth, fifth, and sixth grammatical paragraphs of its Opinion. These facts are wholly undisputed.

Petitioner's counsel sought to file the Complaint under seal. Very shortly thereafter, he received a telephone call from a Deputy U.S. District Court Clerk, inquiring as to whether or not the Complaint should be filed under seal. The Deputy further advised counsel that the Complaint would not be logged into the Electronic Case Filing System (i.e., PACER) until counsel and the Clerk "had discussed the proper filing method." A few days later, that same Deputy Clerk called Petitioner's lawyer and left him a voicemail message to the effect that the Complaint could not be filed under seal until counsel emailed her, requesting

the requisite *in camera*, sealed filing. When counsel returned that call for the purpose of confirming the correct email address, he was informed by a different Deputy that contrary to the earlier voicemail message, an email would not suffice and the Complaint could only be sealed after counsel filed a motion seeking that unusual status.

It is pertinent to note that neither the False Claims Act, nor the Federal Rules of Civil Procedure, nor the Local Rules of the United States District Court for the Middle District of Tennessee, contain any such requirement. Federal Rule of Civil Procedure 54[d] simply permits filing under seal, and is in no way apposite to this controversy. Counsel for the Plaintiff informed the Clerk he would file the Motion but before the Motion was filed the Clerk logged the Complaint into the Electronic Filing System and it was published.

Counsel then filed the Motion, as requested. The Magistrate Judge denied the relief sought, mistakenly concluding that no basis for filing under seal had been set out. Of course, the Motion was unnecessary – the False Claims Act absolutely requires filing under seal – and the Magistrate Judge's reasoning was erroneous for that same reason.

Defense counsel moved to dismiss on the grounds that the Complaint had not been filed under seal and that in any case it failed to state a claim upon which relief could be granted. In response, Ms. Summers' attorney filed a Motion to Amend, and the proposed Amended Complaint. These later two pleadings were made publicly available on PACER. The District Judge granted the Motion to Dismiss, reasoning that the failure to file under seal, standing alone, was fatal,

no matter the exigent circumstances. The Sixth Circuit affirmed, following the same reasoning.

III.

ARGUMENT

No serious, disinterested and well-informed observer could be heard to say that the reasons supporting this Court's granting *certiorari* in this case are not "compelling" within the meaning of Supreme Court Rule 10.

First, the case at bar represents one end of the spectrum of a 180 degree split between the Sixth Circuit and the Ninth Circuit on a question of genuine public importance. There are no cases remotely analogous on their facts in between; either the Ninth Circuit is correct, or the Sixth Circuit is correct. The two contrasting views of the issue presented cannot be reconciled. This is precisely the circumstance contemplated by Supreme Court Rule 10[a].

Second, the parameters of statutory construction of the sealing provision of the False Claims Act must necessarily be considered an important question of federal law that should be, but has not been, resolved by this tribunal.

The Split of Authority

The Ninth Circuit. In 1995, the United States Court of Appeals for the Ninth Circuit decided United States ex rel. Lujan v. Hughes Aircraft Co., 67 F3d 242 (9th Cir. 1995), a case which simply cannot be analytically distinguished from the case at bar. Lujan

raised precisely the same issue as does the case at bar: are the sealing provisions of the False Claims Act so absolute that under no circumstances can circumstances surrounding a failure to file under seal be considered when faced with a motion to dismiss? After an extensive review not only of the facts before it but also the statutory language itself, the Ninth circuit answered that question in the negative, reasoning that by providing the sealing provision, Congress intended to strike a balance between the purposes of *qui tam* actions and law enforcement needs. Lujan at 245. The Ninth Circuit further observed, correctly, that no provision of the False Claims Act explicitly authorizes dismissal for disclosure in violation of the sealing requirement, and that in any case Congress did not make the sealing requirement jurisdictional. Lujan, also at 245. When all was said and done, the Ninth circuit saw to it that its holding could not be misunderstood. At page 247, the following language appears:

> "Our holding today will require district courts to explore the facts underlying violations of the seal requirements before concluding that the extreme sanction of dismissal is warranted."

The Sixth Circuit. In the case at bar, the Sixth circuit, conceding on page 7 of its Opinion that it was dealing with a case of first impression in its purview, squarely raised and squarely rejected both the reasoning and the result to be found in Lujan. Like its sister Circuit, the Sixth left no room for doubt as to its holding:

> "Now having the issue squarely before us, we decline to follow the Lujan court's analysis, and

> hold that violations of the procedural requirements imposed on *qui tams* plaintiffs under the False Claims Act preclude such plaintiffs from asserting *qui tams* status." United States ex rel. Summers v. LHC Group, Inc., -- F.—2010 WL 3917058 (6th Cir. 2010)

In summary, the Ninth Circuit has approved a balancing test; the Sixth Circuit has held that any violation of the sealing requirement is a death knell. One Circuit is correct; the other is not.

Ms. Summers has no desire to build a strawman for the sole and express purpose of burning it. But, it is not unreasonable to suggest that the Respondent might be heard to say that the result obtained in the United States Court of Appeals for the Second Circuit in United States ex. rel. Pilon v. Martin Marietta Corporation, 60 F3d 995 (2nd Cir. 1995) somehow militates against this Court granting *certiorari* in the case at bar. Any such argument is entirely without merit. First, Pilon simply does not address the core question that has split the Ninth and Sixth Circuits. Second, Pilon has a distinguishing characteristic not found either in the case at bar or in Lujan: a "considerable lack of good faith" on the part of the Relator's attorney. Pilon at 999. No such thing existed in Lujan; in the case at bar, there was not so much as the suggestion of bad faith.

IV.

CONCLUSION

When the United States Congress grants what has come to be known as "private attorney general" status to litigants, it is necessarily acting in the interest of public welfare. Insofar as the False Claims Act is concerned, as of this moment the only bench and bar that can act with any degree of confidence as to the sealing provision are those lawyers and judges located in the Ninth Circuit and the Sixth Circuit. It is hard to construct a more compelling circumstance for this Court exercising its supervisory authority and resolving a question of compelling importance and thus resolving an otherwise irreconcilable split among the Circuits. Sally Christine Summers earnestly submits that for these reasons, her Petition for the Writ of *Certiorari* should be granted.

Respectfully submitted,

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APPENDIX A

RECOMMENDED FOR FULL-TEXT PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 09-5883

[Filed October 4, 2010]

UNITED STATES OF AMERICA ex rel., *Plaintiff-Appellee,*	)
SALLY CHRISTINE SUMMERS, *Plaintiff-Appellant,*	)
v.	)
LHC GROUP, INC., *Defendant-Appellee.*	)

Appeal from the United States District Court for the Middle District of Tennessee at Nashville. No. 09-00277—Thomas A. Wiseman, Jr., District Judge.

Argued: June 15, 2010

Decided and Filed: October 4, 2010

Before: KEITH, BOGGS, and McKEAGUE, Circuit Judges.

COUNSEL

ARGUED: Phillip L. Davidson, Nashville, Tennessee, for Appellant. William H. Jordan, ALSTON & BIRD, LLP, Atlanta, Georgia, Ellen Bowden McIntyre, ASSISTANT UNITED STATES ATTORNEY, Nashville, Tennessee, for Appellee. **ON BRIEF:** Phillip L. Davidson, Nashville, Tennessee, for Appellant. William H. Jordan, Lisa Barry Frist, ALSTON & BIRD, LLP, Atlanta, Georgia, Ellen Bowden McIntyre, ASSISTANT UNITED STATES ATTORNEY, Nashville, Tennessee, for Appellee.

BOGGS, J., delivered the opinion of the court, in which McKEAGUE, J., joined. KEITH, J. (pp. 18-21), delivered a separate opinion concurring in the result.

OPINION

BOGGS, Circuit Judge. Appellant Sally Summers ("Summers") appeals an order of the district court denying her motion under Federal Rule of Civil Procedure 59(e) to alter an earlier judgment dismissing with prejudice the claims that she had brought pursuant to the False Claims Act ("FCA"), 31 U.S.C. § 3729 *et seq.* Summers argues that the district court applied an improper legal standard by holding that her failure to comply with the FCA's requirement that complaints in *qui tam* actions be filed under seal

was, in and of itself, fatal to her claim. She further argues that the correct legal standard is one in which the nature and circumstances of the violation are taken into account, and that the district court failed to consider those factors. We hold that the FCA's language defeats Summers's argument, and affirm.

I

Summers filed the complaint in this case on March 20, 2009. According to the complaint, Summers was, in 2008, employed as a physical therapist by the appellee LHC Group, Inc. ("LHC"), a corporation engaged in the business of providing in-home health services to patients insured by Medicare. The complaint further alleged that LHC routinely continued to recommend, provide, and bill Medicare for health services for patients even after staff members informed their managers that such care was no longer needed. Summers alleged that she herself had repeatedly complained to LHC management that these actions were fraudulent, but was told "not to mention the word fraud" and that LHC management took no action to address her concerns. She further claimed that, on December 10, 2008, LHC employed a pretextual reason to terminate her employment and that the real reason for her termination was her complaints about LHC's fraudulent actions.

Summers's complaint pled federal jurisdiction over her claims via the FCA, in that "[t]he aforementioned acts committed by the LHC management and employees constituted fraud against the United States Government in violation of 31 U.S.C. § 3729-3733 *et seq.*, 'The False Claims Acts.'" In her prayer for relief, she requested that the United States be served with

process and that she be permitted to prosecute the case on its behalf if it should choose not to be a party.

According to an affidavit filed by Summers's counsel, shortly after the filing he was contacted by an employee of the clerk's office who inquired as to whether the complaint should be placed under seal. During that conversation, Summers alleges, counsel was told that the complaint "would not be logged into the [Electronic Case Filing] system until [counsel] and the Clerk's Office had discussed the proper filing method." Appellant's Br. at 6. On March 23, 2009, that same employee of the clerk's office allegedly left counsel a voicemail message informing him that, in order to file the complaint under seal, he needed to send her an email making that request. However, when counsel called the clerk's office to confirm the relevant email address, he was told by another employee there that an email would not suffice, and instead that he would be required to file a motion to seal the case.

On March 24, 2009, prior to Summers's counsel's filing any motion to seal, the complaint was posted on PACER, the publicly-accessible Internet-based portal providing access to court filings; thus, it was available to anyone with a PACER account who was willing to pay the applicable fee for accessing court documents online. On March 26, 2009, Summers's counsel received a call from an Assistant United States Attorney informing him that the U.S. Attorney's Office had seen the case on PACER. *Ibid.* Finally, on March 27, 2009, counsel filed a motion to seal the case; that motion was denied by the district court three days later for failure to set forth a basis on which it should be granted.

On April 15, 2009, LHC moved to dismiss the complaint. As a basis for its motion, LHC argued, pursuant to Federal Rule of Civil Procedure 12(b)(1), that the failure of Summers's counsel to file the complaint under seal violated the requirements of the FCA, leaving the court without subject matter jurisdiction. LHC also argued in the alternative that, pursuant to Federal Rule of Civil Procedure 12(b)(6), Summers had failed to state a claim on which relief could be granted.[1] Before the district court could rule on LHC's motion to dismiss, Summers filed a motion to amend her complaint on April 22, 2009. Rather than attaching her proposed amended complaint to that motion, however, she filed it as a separate, and publicly-available, docket entry. She then filed yet another publicly-available version of the complaint, styled "Substituted Amended Complaint," on April 23, 2009, without the district court's permission.

The district court granted LHC's motion to dismiss on June 11, 2009. *United States ex rel. Summers v. LHC Grp. Inc.*, No. 3:09-CV-277, 2009 WL 1651503 (M.D. Tenn. June 11, 2009). In so doing, the court found it unnecessary to reach the question of whether a failure to meet the FCA's *in camera* filing requirements presented a jurisdictional bar, instead holding that "the failure in this case to file [the] complaint *in camera* and under seal is a fatal deficiency that requires dismissal of this action with prejudice as to the relator . . . both because her failure

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[1] LHC's motion to dismiss also argued that Summers had failed to plead fraud with particularity, as required by Federal Rule of Civil Procedure 9(b). The district court did not reach this issue, and it is not before us.

to comply with the statute deprives her of the ability to pursue the remedy created by the statute, and because the same failure incurably frustrates the underlying purposes of the procedural requirements."[2] *Id.* at *6. The district court explicitly held that the dismissal was without prejudice as to the United States. *Ibid.* Summers subsequently filed a motion to alter the judgment pursuant to Rule 59(e) on June 19, 2009, which was denied in a marginal order by the district court on July 8, 2009 "for the reasons set forth in the previous Memo and Judgment" granting LHC's motion to dismiss.

This timely appeal followed.

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[2] The district court, in a footnote, stated that "if it were required to make an express finding on the issue," it would hold the requirements to be non-jurisdictional, largely because if they *were* jurisdictional then a violation would require the complaint to be dismissed with prejudice to both the relator and the United States, thus depriving the United States of its right to pursue the litigation if it so chose. *United States ex rel. Summers*, 2009 WL 1651503, at *6 n.7 (citing *United States ex rel. Ubl v. IIF Data Solutions*, 2009 WL 1254704 (E.D. Va. May 5, 2009)). Because the issue is neither in controversy nor necessary to decide in this case, we will assume without deciding that the under-seal requirements are procedural and not jurisdictional, an assumption supported by the fact that other requirements for *qui tam* claims under the FCA are *explicitly* jurisdictional. *See Graham County Soil and Water Conservation Dist. v. United States ex rel. Wilson*, 130 S. Ct. 1396, 1401–02 (2010) (noting that 31 U.S.C. § 3730(e)(4)(A) provides that "[n]o court shall have jurisdiction over an action" based on certain previously publicly disclosed allegations or transactions); *Russello v. United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.").

II

Although we generally review a denial of a motion to alter or amend a judgment for abuse of discretion, we address questions of law presented in such proceedings de novo. *Huff v. Metro. Life Ins. Co.*, 675 F.2d 119, 122 n.5 (6th Cir. 1982). Moreover, we specifically review de novo the district court's statutory interpretation of the FCA. *See United States ex rel. Bledsoe v. Cmty. Health Sys., Inc.*, 342 F.3d 634, 641 (6th Cir. 2003). Where, as here, "a statutory right is being pursued . . . and the defense raised is that the plaintiff or defendant does not come within the purview of the statute, the judicial acceptance of this defense, however it is accomplished, is the death knell of the litigation and has the same effect as a dismissal on the merits." *Rogers v. Stratton Indus., Inc.*, 798 F.2d 913, 917 (6th Cir. 1986).

III

A

The False Claims Act imposes liability on "[a]ny person who . . . knowingly presents, or causes to be presented, to an officer or employee of the United States Government . . . a false or fraudulent claim for payment or approval." 31 U.S.C. § 3729(a)(1) (2006) (amended 2009).[3] The FCA further authorizes private

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[3] The FCA also imposes liability on related grounds, such as knowingly making or using false records to obtain payment for false claims, or conspiring to defraud the Government by getting a false claim allowed or paid. *See* 31 U.S.C. 3729(a)(2)–(3) (2006) (amended 2009). Neither the original complaint nor either version of the amended complaint specify the precise subsections

persons to bring civil actions for violations of section 3729 in the Government's name, and entitles those persons to a portion of the amount recovered thereby. 31 U.S.C. § 3730(b)(1) (2006) (amended 2009); 31 U.S.C. § 3730(d) (2006) (amended 2009). In such *qui tam* actions, however, the complaint is not immediately made available to the public or even to the defendant; instead,

> [a] copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government pursuant to Rule 4(d)(4) of the Federal Rules of Civil Procedure. The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. The Government may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information.

Id. at § 3730(b)(2) (footnote omitted). Thus the statute that creates the cause of action at issue and authorizes *qui tam* plaintiffs to pursue it also specifies that the complaint be filed under seal.

Originally, the FCA was enacted in 1863 to respond to rampant fraud in Civil War defense contracts. *Am. Textile Mfrs. Inst., Inc. v. The Ltd., Inc.*, 190 F.3d 729,

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Summers wished to invoke, instead claiming only that LHC's actions violated "Title 31 U.S.C. § 3729-3733 *et seq.*, 'The False Claims Acts.'" Be that as it may, the issues in this appeal are unaffected by the type of FCA violation Summers's complaint might fairly be read to allege.

733 (6th Cir. 1999); S. Rep. No. 99-345, at 8 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5273. At the time of its passage, enforcement of a statute via the creation of a *qui tam* cause of action had been a long-accepted practice dating from at least the thirteenth century. Note, *The History and Development of Qui Tam*, 1972 Wash. U.L.Q. 81, 83 (1972) (citing 3 W. Blackstone, *Commentaries on the Laws of England* 160 (1st ed. 1768)). Nevertheless, and despite the necessity of ensuring enforcement of the Act with a minimum expenditure of resources from the already-stretched wartime government, the original FCA's *qui tam* enforcement structure was not implemented without misgivings. Distrust of the "informers" who were expected to bring acts of fraud to the government's attention led the bill's own sponsor to characterize it as "setting a rogue to catch a rogue." Cong. Globe, 37th Cong., 3d Sess. 955–56 (1863) (remarks of Sen. Howard).

Senator Howard's remarks proved prescient, most notably in 1941 when the Supreme Court decided that so-called "parasitic" *qui tam* suits under the FCA—that is, suits filed by private citizens utilizing knowledge of the alleged fraud that the relator had gleaned from criminal indictments based on the very same actions—were nevertheless permitted by the statute. *See United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943). In response to *Hess*, Congress amended the FCA in 1943 to provide that the Government's prior knowledge of the allegations in the complaint was a jurisdictional bar to *qui tam* suits. *United States ex rel. LaValley v. First Nat'l Bank of Boston*, 707 F. Supp. 1351, 1354–55 (D. Mass. 1988).

The FCA did not require that the relator's complaint be filed under seal, however, until the passage of amendments to the Act by the 99th Congress in 1986. At that time of the 1986 amendments, the Senate Committee indicated that its "overall intent in amending the *qui tam* section of the False Claims Act [was] to encourage more private enforcement suits," but gave several other reasons for imposing the specific requirement that a *qui tam* False Claims Act complaint be filed under seal. S. Rep. No. 99-345, at 23–24. Most prominently, it noted that the under-seal requirement gave the Government the chance to determine "whether it was already investigating the claims stated in the suit and then to consider whether it wished to intervene" prior to the defendant's learning of the litigation. *Erickson ex rel. United States v. Am. Inst. of Biological Sciences*, 716 F. Supp. 908, 912 (E.D. Va. 1989) (citing S. Rep. No. 99-345, at 24); *United States ex rel. Pilon v. Martin Marietta Corp.*, 60 F.3d 995, 998 (2d Cir. 1995). Relatedly, the requirement served to "prevent alleged wrongdoers from being tipped off that they were under investigation." *Erickson*, 716 F. Supp. at 912. Consistent with these rationales, the Senate Report on the 1986 amendments specified that "[n]othing in the statute . . . precludes the Government from intervening before the 60-day period expires, at which time the court would unseal the complaint and have it served upon the defendant . . . ." S. Rep. No. 99-345, at 24. Thus the primary purpose of the under-seal requirement is to permit the Government sufficient time in which it may ascertain the status quo and come to a decision as to whether it will intervene in the case filed by the relator.

B

The statutory purpose of the under-seal requirement is of particular importance to this case, because the appellant argues that the logic of the *Erickson* decision, which the district court found persuasive, misconstrued that purpose. In *Erickson*, a district court dismissed an FCA complaint where the relator failed to file the complaint under seal, both because "a party pursuing a statutory remedy must comply with all the procedures the statute mandates" and, separately, because "[s]ound policy also support[ed] dismissal." *Erickson*, 716 F. Supp. at 911–12. With respect to the former justification, the *Erickson* court noted that

> [i]n general, a party pursuing a statutory remedy must comply with all the procedures the statute mandates. As the Supreme Court put it . . . , if a statute "creates a new liability and gives a special remedy for it, . . . upon well-settled principles the limitations upon such liability become a part of the right conferred, and compliance with them is made essential to the assertion and benefit of the liability itself."

Id. at 911 (quoting *United States ex rel. Texas Portland Cement Co. v. McCord*, 233 U.S. 157, 162 (1913)) (second ellipsis in *Erickson*).

As to the "sound policy" justification, the *Erickson* court held that the provisions of the FCA were adopted to permit the Government to determine in private whether it was already investigating the claims at issue, while at the same time preventing defendants

from learning they were under investigation.[4] In language echoed by the district court in this case, the *Erickson* court held that the relator's "failure to comply with the filing and service provisions irreversibly frustrates the congressional goals underlying those provisions." *Id.* at 912.

Summers argues that *Erickson* incorrectly construed the intent behind the sealing requirements, and that therefore, by relying on the logic of *Erickson*, the district court in this case erred on a matter of law. According to Summers, *Erickson*'s reliance on non-*qui tam* cases to divine Congressional intent was inapposite, because Congress had specifically indicated that their purpose in passing the seal requirements was to balance the needs of law enforcement with the private-law-enforcement nature of the *qui tam* provisions—a specific balance not at issue in other statutes. Appellant's Br. at 23–24.[5]

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[4] The *Erickson* court also indicated that, as a secondary goal, Congress intended "to protect the defendant's reputation from unfounded public accusations." *Erickson*, 716 F. Supp. at 912. While the requirement at issue certainly has that *effect*, which could well be laudable, we have found no support in the legislative history of the 1986 amendments to the FCA for the proposition that this was one of the *purposes* of the under-seal requirement.

[5] The district court in this case also cited the Second Circuit's decision in *Pilon*, in which that court affirmed a district court's dismissal of an FCA case in which the *qui tam* relators had failed to file their complaint under seal and, in fact, had given an interview about their claims to a newspaper reporter mere hours after filing. Summers attacks *Pilon* on the grounds that the court in that case inappropriately considered "other interests not addressed by [the] legislative history" (in addition to those explicit in the legislative history) in evaluating whether their conduct

Instead, Summers urges us to adopt a balancing test adopted by the Ninth Circuit in *United States ex rel. Lujan v. Hughes Aircraft Co.*, 67 F.3d 242 (9th Cir. 1995). In *Lujan*, an employee of the defendant brought a *qui tam* action under the FCA alleging that Hughes had mischarged the Government for work it had performed on radar systems, and also alleged that she had been the victim of employment discrimination and retaliatory termination. *Id.* at 243; *See also* 31 U.S.C. § 3730(h) (establishing a separate right to relief for employees who suffer retaliatory actions as a consequence of lawful acts done in furtherance of efforts to stop FCA violations). Lujan had also, prior to filing her *qui tam* suit, made similar allegations against Hughes in the course of a wrongful termination suit and a worker's compensation claim, and had been questioned extensively about "the basis of her forthcoming *qui tam* claim" by Hughes's attorney during depositions relating to her wrongful termination suit. *Lujan*, 67 F.3d at 243–44. Though Lujan did file her *qui tam* suit under seal, approximately thirty-four days into the sixty-day

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frustrated the purposes of the FCA, including the potential damage to a defendant's reputation. *See Pilon*, 60 F.3d at 999. It is unclear how dispositive these "other interests" were to the *Pilon* court, but Summers is nevertheless correct that there is no evidence Congress intended any particular interest of the defendant's to be protected other than the removal of a procedural quirk that could sometimes require a defendant to answer a complaint a mere two days after being served. *See supra* at n.5. Even so, *Pilon* also relied heavily on the analysis present in *Erickson* to reach its decision, and presumably would have reached the same conclusion even if the extraneous considerations had been excised. *See Pilon*, 60 F.3d at 999 ("The Pilons' failure to comply with the service and filing requirements incurably frustrated *all* of these interests.") (emphasis added).

under-seal period an article appeared in the *Los Angeles Times* reporting the existence of the *qui tam* suit and disclosing the general nature of Lujan's allegations; the *Times* appears to have obtained at least some of that information from Lujan herself. *Id.* at 244. After the Government eventually notified the court that it would not intervene in the case, the district court granted a motion to dismiss by Hughes on the grounds that Lujan had failed to comply with the seal provisions. *Ibid.*

The Ninth Circuit reversed. Though it observed that "Lujan clearly violated the seal provision," *Lujan*, 67 F.3d at 244, it also indicated that "[n]o provision of the False Claims Act explicitly authorizes dismissal as a sanction for disclosures in violation of the seal requirement," and that the district court had erred in concluding that the authorization for such dismissal was implicit in the purpose of the seal requirement. *Id.* at 245. Instead, the Ninth Circuit held that, when the seal provisions are broken, the balance between the purposes of *qui tam* actions and law enforcement needs must be evaluated in light of the facts and circumstances of the case. *Ibid.* Specifically, the Ninth Circuit held that three factors should be considered when determining whether dismissal is an appropriate sanction for a violation of the sealing requirements: (1) the extent to which the Government had been harmed by the disclosure; (2) the nature of the violation in terms of its "relative severity"; and (3) the presence or absence of bad faith or willfulness on the relator's part. *Id.* at 246. Finding that an evaluation of the facts of Lujan's case as they pertained to those factors seemingly argued against dismissal, the Ninth Circuit remanded for further consideration of whether dismissal was appropriate. *Ibid.*

LHC responds to *Lujan* primarily with a side-step: they argue that *Lujan* is inapposite because, in that case, the relator *did* file her complaint under seal, and only violated the sealing provisions after a significant portion of the sealing period had elapsed. In so doing, they point to language in *Lujan* emphasizing the factual differences between that case and *Erickson* and *Pilon*:

> For example, in *Erickson*, the relator *completely* failed to comply with *any* of the requirements of § 3730(b)(2). Similarly, in *Pilon*, counsel failed to file the complaint *in camera*, failed to serve the United States with a copy of the complaint and a written disclosure of the underlying evidence, and, several hours after filing, arranged for an extensive interview with a reporter.

Lujan, 67 F.3d at 246.

The distinction between *Lujan*'s after-filing violation and Summers's failure to file under seal at all makes for a tempting target. Certainly, it would be rational to argue that a very broad range of circumstances might obtain when a post-filing violation occurs, and that a plaintiff who inadvertently lets slip the substance of her complaint to the editor of a local newsletter on day fifty-nine of the *in camera* period has committed a qualitatively different act than one who marches from the clerk's office to a press conference on the courthouse steps immediately after filing. In the former case, there would be comparatively little damage possible to the Government's interest in preserving the seal, and presumably little damage done. It would further make

sense to argue that, when a complaint is not filed under seal at all, the logic of *Lujan* simply does not apply because the Government has had *no* chance to evaluate the claims against the defendant, which have effectively been published to anyone willing to search the publicly available court records. Indeed, this is the reasoning relied upon by the district court and the appellees.[6]

However, the reasoning of *Lujan* itself appears to make such a distinction illusory. Rather, in evaluating the question of whether damage had been done to the Government's interest in conducting investigations without "tipping off" the defendant, the Ninth Circuit observed that

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[6] For its part, the Government has filed a brief asserting that the *Lujan* test "properly captured how these violations should be handled." Its discussion of this issue, however, is primarily limited to support for the particular factors considered by the *Lujan* court; it does not make a developed argument with respect to the predicate question of whether a balancing test ought to be applied in the first instance. Relatedly, we note that although the Government designated itself as an appellee in this case, and in fact was permitted to share time at oral argument with LHC Group, it appears that its real interest in this case is more closely aligned with that of the appellant. Accordingly, we have reformed the party designations as indicated on the above caption. As it has not been argued on appeal, we deliberately refrain from deciding at this time whether the Government has standing to appear as a party on appeal when it has declined to participate in an FCA case in the district court. *See United States ex rel. Smith v. Lampers*, 69 F. App'x 719, 721 (6th Cir. 2003) (assuming, in the absence of arguments to the contrary, "that the Government has standing to appeal [a] district court's final judgment dismissing [a] case with prejudice over the government's objection" even though the government did not formally exercise its right to intervene under the FCA.).

> [w]e have reason to doubt whether the Government actually suffered any harm in this case. Both parties refer in their briefs to Hughes' deposition of Lujan in her state court proceedings; the deposition took place before her *qui tam* case was filed and before any seal existed. The deposition transcript excerpts presented by Lujan indicate Hughes was aware of Lujan's intent to file a *qui tam* action and of the nature of her allegations. In light of the fact that Lujan's disclosure to the *Times* gave only general descriptions of her claims in contrast to the very detailed answers Lujan gave Hughes' attorney during her deposition, there is a strong inference that Hughes did not learn anything from the *Times* articles that it did not already know. If Hughes learned nothing from the *Times* articles, then the articles alone could not have prompted any action by Hughes, and the Government's investigation could not have been hampered by the articles.

Lujan, 67 F.3d at 245–46. Thus one critical event, in the Ninth Circuit's view, was a disclosure that occurred even before the FCA lawsuit had been filed. Presumably, then, the Ninth Circuit would have reached the same conclusion even if the complaint had never been filed under seal, as long as nothing contained therein could have prompted any action by Hughes by supplying it with information it did not already know. Therefore, under *Lujan*, a district court would seemingly be required to conduct the balancing-test analysis regardless of whether the alleged breach occurred after filing or due to a failure to file *in camera* altogether, and to skirt the logic of *Lujan* by making that distinction would miss its import.

Perhaps even more importantly, the questions of which factors to weigh and how to weigh them were, in the *Lujan* court's view, subsequent to a determination that a facts-and-circumstances analysis was required in order to preserve the balance Congress intended in the first place. Tellingly, the language cited by the Appellees distinguishing the facts of *Lujan* from those of *Erickson* and *Pilon* comes from a section of *Lujan* discussing the question of how severe the breach might have been—an inquiry the court would never even reach if a facts and circumstances analysis were not appropriate. Thus the *Lujan* court had moved on from the question presented here to an application of its newly-fashioned test.

This circuit has never addressed the question of whether a violation of the sealing provisions applicable to *qui tam* relators under the FCA precludes recovery by the relator.[7] Now having the issue squarely before us, we decline to follow the *Lujan* court's analysis, and hold that violations of the procedural requirements imposed on *qui tam* plaintiffs under the False Claims Act preclude such plaintiffs from asserting *qui tam* status.

We do so for several reasons. Most prominently, a *Lujan*-style balancing test would, in our opinion, represent a form of judicial overreach. In fashioning

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[7] In our nearest approach to this issue, a non-oral-argument panel of the court affirmed dismissal of a putative relator's FCA claims, noting only that "[s]ummary judgment was also proper on the claim under the False Claims Act, as Hackett complied with none of the requirements for filing a qui tam claim." *Hackett v. Martin Marietta Corp.*, 98 F.3d 1341 (table), 1996 WL 577628, at *1 (6th Cir. Oct. 7, 1996) (citing *Pilon*, 60 F.3d at 997–1000).

the FCA's procedural requirements, Congress clearly identified the factors it found relevant and considered the tension between them, and decided that a sixty-day *in camera* period was the correct length of time required to balance those factors. The Senate Committee on the Judiciary, in explaining the decision to impose the under-seal requirement, reported that

> [t]he initial 60-day sealing of the allegations has the same effect as if the *qui tam* relator had brought his information to the Government and notified the Government of his intent to sue. The Government would need an opportunity to study and evaluate the information in either situation. Under this provision, the purposes of *qui tam* actions are balanced with law enforcement needs as the bill allows the *qui tam* relator to both start the judicial wheels in motion and protect his own litigative rights. If the individual who planned to bring a *qui tam* action did not file an action before bringing his information to the Government, nothing would preclude the Government from bringing suit first and the individual would no longer be considered a proper *qui tam* relator. Additionally, much of the purpose of *qui tam* actions would be defeated unless the private individual is able to advance the case to litigation. The Committee feels that sealing the initial private civil false claims complaint protects both the Government and the defendant's interests without harming those of the private relator.

S. Rep. 99-345, at 24. Thus Congress was well aware of the various policy interests that might be affected by

an *in camera* requirement, and chose a sixty-day requirement accordingly.

Two other features of the requirement support the conclusion that Congress's selection of sixty days was intended to represent its own judgment as to how to balance those interests. First, the Committee explicitly indicated that "[n]othing in the statute . . . precludes the Government from intervening before the 60-day period expires, at which time the court would unseal the complaint and have it served upon the defendant pursuant to Rule 4 of the Federal Rules of Civil Procedure." *Ibid.* In other words, Congress understood that it was *possible* for circumstances to arise that would obviate the need for the full sixty-day period, and further demonstrated that it knew how to provide for them. The only such circumstance it appears to have found relevant, however, was one in which the Government had already decided to intervene *and had acted on that decision*. The exception is thus entirely within the Government's discretion, consistent with Congress's intent to provide it with a window in which it might "determine both if that suit involves matters the Government is already investigating and whether it is in the Government's interest to intervene and take over the civil action." *Ibid.* No such exception is found in the statute or in its legislative history for situations in which a relator simply fails to abide by the under-seal requirement.

Second, the statute also demonstrates Congress's intent by providing for a mechanism under which the Government may petition a court for extensions of the original sixty-day evaluatory period and the time during which the complaint remains under seal. However, such

> [e]xtensions will be granted . . . only upon a showing of "good cause". The Committee intends that courts weigh carefully any extensions on the period of time in which the Government has to decide whether to intervene and take over the litigation. The Committee feels that with the vast majority of cases, 60 days is an adequate amount of time to allow Government coordination, review and decision. Consequently, "good cause" would not be established merely upon a showing that the Government was overburdened and had not had a chance to address the complaint.

Id. at 24-25.

If Congress knew how to provide for the *extension* of the sixty-day *in camera* period in circumstances where the Government could show good cause, it surely knew how to provide for the *abbreviation* of that period when one of the other parties affected by the requirement—in this case, the relator—could show good cause. The fact that Congress did not do so is not ours to gainsay. *See Bryant v. Dollar Gen. Corp.*, 538 F.3d 394, 402 (6th Cir. 2008) ("Established principles of statutory interpretation caution against . . . an interpretation inconsistent with the intent of Congress.") (citation and internal quotation marks omitted).

We also find unpersuasive the argument that "[t]he mere possibility that the Government *might* have been harmed by disclosure is not alone enough reason to justify dismissal of the entire action." *Lujan*, 67 F.3d at 245. The mere possibility that the Government *might* be harmed by disclosure is, in fact, the point of

the *in camera* requirement. The legislative history of the 1986 amendments reveals that Congress was concerned not with punishing plaintiffs for publicizing the claims, but rather with ensuring that the Government was given a fair chance to evaluate those claims at a time when it could be certain that the status quo had not been disturbed by the defendant's knowledge that the lawsuit had been filed. In that sense, the rules are in place precisely because Congress understood that a defendant's knowledge that the Government has *in fact* been made aware of the allegations against it could well lead the defendant to change its behavior, for good or ill, and thus the extent to which the Government might be harmed by disclosure is impossible to evaluate *a priori*.

It is perhaps true that in some cases a disclosure might turn out to be relatively benign. Such an outcome, however, would be affected in large measure by information to which the plaintiff has no access, including the state of any investigation already undertaken by the Government and its own internal investigative priorities, and the extent to which a defendant may have guessed that a *qui tam* suit was coming and that defendant's tolerance for risk in the face of such a possibility. For that reason, even disclosures that cause little or no harm to the Government's interest do so through no particular virtue of the plaintiff. Requiring violations of the FCA's under-seal requirement to be subjected to a balancing test thereby both misses the point of the requirement itself and potentially encourages plaintiffs to comply with the FCA's underseal requirement only to the point the costs of compliance are outweighed by the risk that any given violation would turn out to be severe enough to require

dismissal of an FCA claim. Under such a regime, plaintiffs would be encouraged to make disclosures in circumstances when doing so might particularly strengthen their own position, such as those in which exposing a defendant to immediate and hostile media coverage might provide a plaintiff with the leverage to demand that a defendant come to terms quickly. In other words, the extent of a plaintiff's compliance with the FCA's under-seal requirement would become subject to the same risk analysis as any other litigation tactic, an analysis in which it would be the plaintiff's, not the Government's, interests that were paramount. Given that the very existence of the *qui tam* right to bring suit in the name of the Government is created by statute, it is particularly appropriate to have the right exist in a given case only with the preconditions that Congress deemed necessary for the purpose of safeguarding the Government's interests. Summers's arguments that the cases relied upon by LHC did not themselves involve the particular balance addressed by Congress vis-a-vis the FCA are irrelevant. As a matter of statutory construction, those cases stand for the proposition that the procedural requirements imposed by a statute reflect the compromise between competing interests in the manner intended by Congress, and thus condition the plaintiff's cause of action, without regard to factors we might otherwise consider pertinent. An FCA plaintiff who cannot satisfy those conditions, like Summers, cannot bring suit in the name of the Government and has no basis for recovery.

C

Summers attempts to present a second issue in her brief on appeal, inasmuch as she argues that "the nature of the violation of section 3730(b)(2) did not warrant dismissal." *See* Appellant Br. at 20–22. In essence, this is an argument that she made a "good faith attempt to file the complaint under seal" and that her failure to do so was not willful.

These issues did not form a basis for the decision below, and remain immaterial on appeal given our analysis above. Though good faith and willfulness might be relevant if we were to accept the proposition that violations of the FCA's procedural requirements should be analyzed through a balancing test, they carry no weight when the essential preconditions for *qui tam* status have not been met.

D

Finally, we note that the Government has asked that we clarify that any dismissal of Summers's claims is without prejudice to their ability to bring the same claims against LHC. The district court explicitly held that its dismissal was without prejudice to the United States. *United States ex rel. Summers*, 2009 WL 1651503, at *1, *6. The appellee has not challenged that determination, and indeed relies upon the fact that the district court's dismissal was without prejudice to the United States to argue that the "prejudice to the Government" element of the *Lujan* test does not weigh in Summers's favor even if that test were to apply. Appellee Br. at 23–24. As all parties appear to agree with the district court on this issue, we decline to settle a question not in dispute.

IV

Congress has created the *qui tam* cause of action in False Claims Act cases, and has imposed procedural conditions on that cause of action as it sees fit to balance competing policy goals. We will not second-guess its calculus; without meeting those conditions, a False Claims Act plaintiff has no more right to bring suit in the Government's name than any other private person. The judgment of the district court is **AFFIRMED**.

CONCURRING IN THE RESULT

KEITH, Circuit Judge, concurring. Although I concur in the result the majority reaches, I write separately to provide clarification as to: 1) the current state of the law regarding dismissal of a private citizen's *qui tam* claim for failure to comply with the False Claims Act's filing procedures; and 2) Congress' intent in creating these procedures.

I.

Although the proper rule to be used when assessing whether to dismiss a relator's improperly filed *qui tam* complaint is an issue of first impression in the Sixth Circuit, both the Second and Ninth Circuits have addressed the matter. *United States ex rel. Lujan v. Hughes Aircraft Co.*, 67 F.3d 242 (9th Cir. 1995); *United States ex. rel. Pilon v. Martin Marietta Corp.*, 60 F.3d 995 (2d Cir. 1995). Contrary to defendant LHC Group Inc.'s (LHC) and the district court's characterization, however, our sister circuits have adopted an approach that determines whether to dismiss an improperly filed complaint on a case by case basis, as opposed to the *per se* rule adopted here.

The district court, in concluding that letter-perfect compliance with the FCA's filing procedures is required to survive a motion to dismiss, relied primarily on *Erickson ex rel. United States v. American Inst. of Biological Scis.*, 716 F. Supp. 908 (E.D. Va. 1989). The court in *Erickson*, lacking any guidance for its interpretation of the then relatively new

procedures, concluded that dismissal of improperly filed claims is mandatory. *Id.* at 911-12. Since then, however, multiple courts have addressed the matter, hesitating to adopt a rule requiring dismissal. *See Lujan*, 67 F.3d at 245 (setting out a three-part balancing test for the purposes of determining whether the court should dismiss relator's improperly filed *qui tam* complaint); *Pilon*, 60 F.3d at 998-99, 1000 n.5 (examining the impact of filing and service defects on government's ability to prosecute the case before granting dismissal and distinguishing the case from another where the procedural failure had minimal impact); *United States ex rel. Branch Consultants, L.L.C. v. Allstate Ins. Co.*, 668 F. Supp. 2d 780, 803 (E.D. La. 2009) ("[N]umerous courts have held that such requirements are not jurisdictional and their violation does not require dismissal of the complaint."); *United States ex rel. Bogart v. King Pharms.*, 414 F. Supp. 2d 540, 544 (E.D. Pa. 2006) ("Although a few district courts outside the Third Circuit have held that the FCA's filing and service requirements are jurisdictional, other persuasive circuit authority calls for a balancing of factors when determining whether procedural defects warrant dismissal."); *Wisz ex rel. United States v. C/HCA Dev., Inc.*, 31 F. Supp. 2d 1068, 1069 (N.D. Ill. 1998) (denying defendant's motion to dismiss as relator's filing failure did not prevent the government from having the opportunity to determine whether to intervene); *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Blue Cross Blue Shield of Ga., Inc.*, 755 F. Supp. 1040, 1054 (S.D. Ga. 1990) ("The Court sees no reason to demand letter-perfect compliance with the provision in a case[] such as this one[.]"); *United States ex rel. Kusner v. Osteopathic Ctr.*, No. 88-9753, 1996 U.S. Dist. LEXIS 7389, *15 (E.D. Pa. May 28, 1996) ("[T]here is nothing

in the language of the False Claims Act which requires that a *qui tam* complaint be dismissed with prejudice if the confidentiality provisions are violated[.]").

As noted, among the courts that have refrained from adopting a *per se* rule are both the Second and Ninth Circuits. While the district court and LHC both read the Second Circuit's decision in *United States ex. rel. Pilon v. Martin Marietta Corp.*, as requiring dismissal in every instance, a closer reading provides a more nuanced answer. The *Pilon* court, as opposed to reflexively finding that dismissal was required, engaged in a careful analysis of the impact of the relator's violation on the United States' ability to pursue a potential case against the defendant – Congress' prime motivation in creating the filing procedures. 60 F.3d at 999. Additionally, the court discussed the relator's lack of a good faith in failing to fulfill the procedural requirements. *Id.* Only after the court completed discussing these points, did it buttress its decision with other cases reaching the same conclusion. *Id.* at 998-99. *See also, Brooks-Ngwenya v. Indianapolis Pub. Schs*, 564 F.3d 804, 808 (7th Cir. 2009) (interpreting *Pilon* as requiring dismissal only when the procedural error has caused irreparable harm); *Bogart*, 414 F. Supp. 2d at 544 (citing *Pilon* for the proposition that the court must consider the impact of the procedural error before dismissing improperly filed complaint).

Taking the *Pilon* court's analysis and restating it, the Ninth Circuit in *United States ex rel. Lujan v. Hughes Aircraft Co.*, enunciated a three-factor test to determine whether a court should dismiss an improperly filed claim, namely: 1) whether the violation actually harmed the government; 2) the

nature and scope of the violation, specifically whether the relator violated all aspects of § 3730(b)(2), as opposed to only some of them; and 3) whether the relator committed the violations willfully or in bad faith. 67 F.3d at 245-247. Finding that the lower court had failed to engage in the proper balancing, the court in *Lujan* remanded the case for further proceedings in accordance with its decision. *Id.* at 248. As noted, a number of lower courts have since adopted the *Lujan* court's approach.

While the majority's interpretation of the False Claims Act is an eminently reasonable one with which I agree, I highlight that it is not based on the misinterpretation of *Pilon* L.H.C. advanced and the lower court accepted.

II.

LHC also argues that the imposition of a rule requiring mandatory dismissal is supported by Congress' intent in creating the requirements. LHC argues specifically that Congress, in addition to protecting the government's right to investigate the private citizen's claim, sought to safeguard the defendant's interest in not being improperly defamed. I, like the majority, find little support for LHC's argument.

Congress created the filing requirements for the primary purpose of securing for the government the opportunity to weigh the merits of a private citizen's *qui tam* claim and, if necessary, investigate the allegations made. *See* S. Rep. No. 99-345, at 24 (1986) *reprinted in* 1986 U.S.C.C.A.N. 5266, 5289; *see also,*

e.g., *Pilon*, 60 F.3d at 998-99 (quoting the Committee report).

While the Committee noted a secondary concern regarding defendants to *qui tam* suits, it was not the concern that LHC alleges. The Committee's sole concern regarding the rights of defendants was the potential that were the government not allowed to determine whether or not it would intervene first, the defendant may have to file an answer without knowing who it would eventually face in court. S. Rep. No. 99-345, at 24. As the court in *Lujan* stated, "[n]ever did the Committee discuss, let alone imply that it sought to protect" the defendant from attack. 67 F.3d at 247. In fact, "by providing for sealed complaints, the Committee d[id] not intend to affect the defendant's rights in any way." *Id. See also, Pilon*, 60 F.3d at 999 (listing a "defendant's reputation" as one of the "other interests *not addressed* by [the] legislative history" (emphasis added)).

Beyond merely the Committee report, the text of the Act supports this conclusion. As the majority notes, the sole party authorized by the FCA to alter the filing procedures is the Attorney General who may, at his discretion, extend the 60 day *in camera* period to facilitate a more thorough investigation. 31 U.S.C. § 3730(b)(3). Had Congress intended to protect the defendant's public reputation, it could have given the defendant similar powers or, at a minimum, once the government's investigation was complete, required that it be given notice of the claim before the complaint was made public. Instead, the text of the Act is devoid of any such provisions.

Accordingly, the majority was correct not to impute to Congress an intent to protect the defendant or to rely on such in reaching its conclusion.

III.

Having addressed these matters, I **CONCUR** in the majority's decision.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 09-5883

[Filed October 4, 2010]

UNITED STATES OF AMERICA ex rel.,	)
Plaintiff - Appellee,	)
SALLY CHRISTINE SUMMERS,	)
Plaintiff - Appellant,	)
	)
v.	)
	)
LHC GROUP, INC.,	)
Defendant - Appellee.	)
	)

Before: KEITH, BOGGS, and MCKEAGUE, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court for the Middle District of Tennessee at Nashville.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the judgment of the district court is AFFIRMED.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

Civil Action No. 3:09-cv-277
Judge Thomas A. Wiseman, Jr.

[Filed June 11, 2009]

UNITED STATES OF AMERICA *ex rel.* SALLY CHRISTINE SUMMERS,

Plaintiff,

v.

LHC GROUP, INC.,

Defendant.

MEMORANDUM OPINION

Before the Court is defendant LHC Group, Inc.'s Motion to Dismiss Complaint and for Attorneys' Fees (Doc. No. 7). The relator, Sally Christine Summers, has filed a response in opposition to the motion (Doc. No. 15), and the United States has filed its "Statement of Interest in Response to Defendant's Motion to Dismiss" (Doc. No. 29). Defendant LHC has filed a reply brief addressing certain arguments raised in

Summers' response (Doc. No. 35). The defendant's motion is now ripe for consideration.

As a result of the relator's failure to file the Complaint *in camera* and under seal as required by 31 U.S.C. § 3730(b)(2), as discussed in greater detail below, the motion to dismiss will be granted and this matter dismissed with prejudice as to relator Sally Christine Summers, but without prejudice to the United States' ability to pursue the same or related claims against LHC should it choose to do so. An appropriate Order entering dismissing Summers' claims will be entered. The request for attorneys' fees will be denied for the reasons set forth herein.

I. PROCEDURAL BACKGROUND

Relator Sally Christine Summers initiated this *qui tam*[1] action under the False Claims Act ("FCA"), 31 U.S.C. § 3729 *et seq.*, with the filing of her Complaint on March 20, 2009. The Complaint essentially alleges that Summers was terminated from her employment with defendant LHC after she complained to management that the defendant was submitting false claims for payment under the Medicare Program. Contrary to express procedural requirements set forth in the FCA, the Complaint was not filed *in camera* or under seal, nor was it accompanied by a motion that it

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[1] *Qui tam* is short for "qui tam pro domino rege quam pro se imposo sequitur," which means he "who brings the action for the king as for himself." *United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743, 746 n.3 (9th Cir. 1993) (citation omitted).

be filed under seal. 31 U.S.C. § 3730(b)(2).[2] The relator's counsel, in fact, appears to have been completely unaware of the requirements of § 3730(b)(2) at the time the Complaint was filed. In an affidavit submitted in support of Summers' response in opposition to the motion to dismiss, counsel for Summers asserts that "shortly after" the complaint was filed, he was contacted by an employee of the Clerk's Office who called him to discuss "whether the Complaint should be placed under seal and the procedure to be used." (Doc. No. 17, at ¶ 3.) Apparently no decision was reached during this conversation but the Clerk's Office employee told counsel she would call him back. Counsel then left the office on other business, returning three days later, on Monday, March 23. At that point he picked up a telephone message from the Clerk's Office employee suggesting he send her an e-mail requesting that she place the case under seal. Counsel called the Clerk's Office to ascertain the correct e-mail address, and was told at that time by a different employee that an e-mail would not suffice; instead, he needed to file a motion to seal the case. Counsel prepared to file the motion on Tuesday, March 24, 2009 but was "surprised" at that point to learn the case had already been posted through CM/ECF on line; he allegedly believed that "no action would be taken until [he] filed the motion to seal." (Doc. No. 17, at ¶ 7.)

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[2] Summers satisfied the other statutory requirements of § 3730(b)(2) by serving initial disclosures on the United States and not initially serving the Complaint upon the defendant. Because the Complaint was not sealed, however, the defendant obviously became aware of it in fairly short order.

After receiving a call from an Assistant U.S. Attorney on March 26 notifying him that his office had picked up the case on PACER, counsel decided to go ahead and file the motion to seal, which he did on March 27, 2009, a full week after filing the Complaint. The motion states, in total: "Comes the Plaintiff and request [sic] that this Complaint be sealed until such time as the United States determines whether or not it will enter this case." (Doc. No. 4, at 1.) Magistrate Judge Knowles promptly denied the motion on the grounds that it was not accompanied by a memorandum of law and provided no basis for granting it. (Doc. No. 5.)

Defendant LHC filed its motion to dismiss on April 15, 2009, asserting that the Complaint should be dismissed with prejudice as to Summers on the grounds that she failed to comply with the mandatory filing requirements set forth in 31 U.S.C. § 3730(b)(2). Alternatively, LHC asserts that dismissal is warranted on the grounds that Summers failed to plead fraud with particularity as required by Rule 9(b) of the Federal Rules of Civil Procedure, and that LHC is entitled to attorneys' fees on the basis that the Complaint is "clearly frivolous, vexatious, and designed for harassment." (Doc. No. 7, at 1.)

Contemporaneously with her response in opposition to LHC's motion and an accompanying memorandum (Doc. Nos. 15 and 16), Summers filed a Motion to Amend Complaint (Doc. No. 13) and a proposed Amended Complaint (erroneously filed as a separate docket entry, Doc. No. 14, rather than as an attachment to the Motion to Amend), which she asserts cures the purported pleading deficiencies by including additional details regarding the allegedly

fraudulent behavior. That proposed Amended Complaint was not filed under seal either. A Substituted Amended Complaint was filed on April 23 (Doc. No. 22), likewise unsealed and without the Court's permission.

The United States thereafter filed its Statement of Interest (Doc. No. 29) in which it takes no formal position on LHC's motion, but does assert that any dismissal of the action should be without prejudice as to the United States.

II. DISCUSSION

A. The FCA's Procedural Requirements

The FCA imposes civil liability upon "[a]ny person" who, among other things, "knowingly presents, or causes to be presented to . . . the United States . . . a false or fraudulent claim for payment or approval." 31 U.S.C. § 3729(a). The United States may initiate an FCA action on its own, *id.* § 3730(a), or alternatively through the *qui tam* provisions of the Act which permit private citizens, referenced as "relators," to bring actions on behalf of the United States. The FCA specifically mandates that *qui tam* complaints must be filed initially under seal, *in camera*, and served upon the Attorney General and the United States, but not on the defendants. *Id.* § 3730(b)(2).[3] The Attorney

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[3] That provision states in full:

A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government pursuant to Rule 4(d)(4) of the Federal Rules of Civil Procedure [now Fed. R. Civ. P. 4(i)]. *The complaint*

General then has sixty days, subject to extension, to investigate the allegations and determine whether to intervene and take over the suit. *Id.* § 3730(b)(2)–(3). If the United States declines to intervene and take over the *qui tam* action, "the person bringing the action shall have the right to conduct the action." *Id.* § 3730(b)(4)(B). The complaint is not to be unsealed and served upon the defendant until the "court so orders." *Id.* § 3730(b)(2).

LHC argues that this matter must be dismissed as a result of Summers' failure to comply with § 3730(b)(2), either because filing under seal in accordance with the statute is a jurisdictional prerequisite to maintaining a *qui tam* action under the FCA or on the grounds that the failure to comply with the procedural requirements of § 3730(b)(2) "incurably frustrated" the congressional purposes underlying the statute. The defendant relies primarily upon the analysis employed in *United States ex rel. Fellhoelter v. Valley Milk Products, L.L.C.*, No. 3:05-CV-343, 2008 WL 217116 (E.D. Tenn. Jan. 24, 2008); *United States ex rel. Pilon v. Martin Marietta Corp.*, 60 F.3d 995 (2d Cir. 1995); and *Erickson ex rel. United States v. American Inst. of Bio. Sciences*, 716 F. Supp. 908 (E.D. Va. 1989).

Summers first argues, in response, that the statute permits dismissal "only if the Court and the Attorney

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shall be filed in camera, *shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders.* The Government may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information. 31 U.S.C.A. § 3730(b)(2) (emphasis added).

General give written consent to the dismissal for their reasons for consenting." (Doc. No. 16, quoting 31 U.S.C. § 3730(b)(1). That argument is utterly without merit. As the United States points out, the provision cited applies only where the *relator* seeks a voluntary dismissal, not when the court orders dismissal on legal grounds. *United States v. Health Possibilities, P.S.C.*, 207 F.3d 335, 344 (6th Cir. 2000).

Alternatively, Summers argues that this Court should adopt the balancing test promulgated by the Ninth Circuit in *United States ex rel. Lujan v. Hughes Aircraft Co.*, 67 F.3d 242, 245 (9th Cir. 1995), and deny the defendant's motion on the grounds that the procedural deficiencies have not been shown to have prejudiced the government or to have resulted from the relator's bad faith.

In sum, the question before this Court is whether the Ninth Circuit's balancing test applies in this context, or whether the procedural deficiency *per se* requires dismissal of the action.

B. *United States ex rel. Lujan v. Hughes Aircraft Co.* Is Inapplicable in the Context Presented.

In 1995, the Ninth Circuit held that the § 3730(b)(2) seal requirements "are not jurisdictional, and violation of those requirements does not *per se* require dismissal of the *qui tam* complaint." *United States ex rel. Lujan v. Hughes Aircraft Co.*, 67 F.3d 242, 245 (9th Cir. 1995). In that case, however, the relator had properly filed the complaint under seal and *in camera* when she instigated suit, but she had violated the seal provisions of the FCA by making

statements to a major newspaper about the existence and nature of her *qui tam* suit while it was still under seal. *Id.* at 244. The defendant brought a motion to dismiss the action as a sanction for the relator's violation of 31 U.S.C. § 3730(b)(2). The district court granted the motion and the Ninth Circuit reversed, noting first that "[n]o provision of the False Claims Act explicitly authorizes dismissal as a sanction for disclosures in violation of the seal requirement," and that by enacting the seal provision, Congress had "intended to strike a balance between 'the purposes of *qui tam* actions [and] . . . law enforcement needs[.]' " *Lujan*, 67 F.3d at 245 (quoting S. Rep. No. 345, 99th Cong., 2d Sess. 24, reprinted in 1986 U.S.C.C.A.N. 5266, 5289) (alteration in original). The Ninth Circuit went on to hold that courts must take this balance into consideration "when constructing a sanction for a violation of the seal provision." *Id.* The court also enumerated the factors to be weighed in conducting that analysis, including: (1) whether the government was actually harmed by the violation; (2) the nature and relative severity of the violation; and (3) the presence or absence of bad faith or willfulness. *Id.* at 245–46.

The factual context of *Lujan* is distinguishable from that of the case at bar, however, insofar as *Lujan* involved a *post-filing* violation of the seal requirement. The Ninth Circuit itself recognized that the violation there was "qualitatively different than the violations in cases that have found dismissal was an appropriate sanction." *Id.* at 246 (referencing *Erickson ex rel. United States v. Am. Inst. of Bio. Scis.*, 716 F. Supp. 908 (E.D. Va. 1989), and *United States ex rel. Pilon v. Martin Marietta Corp.*, 60 F.3d 995 (2d Cir. 1995)). This Court finds that application of *Lujan*'s balancing

test would be inappropriate in the present context, particularly given that the requisite seal was never in place, as a result of which there is no basis for determining as a factual matter whether the United States has been "actually harmed" by the violation. Moreover, the severity of the "violation" and the presence of bad faith or willfulness are not particularly relevant where there was no seal in place to violate. The Court therefore looks instead for guidance from cases factually analogous to the one at bar, nearly all of which have similarly held that *Lujan*'s balancing test is inappropriate and that dismissal is warranted.[4]

C. The Procedural Deficiencies Mandate Dismissal of the Action with Prejudice as to the Relator.

In a widely cited district court decision that predates *Lujan* by some years, the relator failed to file his *qui tam* complaint *in camera* and failed to await a court order before serving the defendant. The court granted the defendant's motion to dismiss on the

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[4] In her response to the defendant's motion, Summers cites *United States v. Fiske*, 968 F. Supp. 1347 (E.D. Ark. 1997), as an example of a case factually similar to the one at bar in which the district court applied the *Lujan* balancing test to conclude that dismissal was not warranted. That court did not expressly rely on *Lujan*, though it referenced the absence of bad faith on the part of the filer and the Government's failure to show injury. Rather, the court noted that it would not, "in light of the Government's waiver of this issue, go on to determine whether the violations of the filing requirements of § 3730(b)(2) were sufficiently egregious to independently warrant dismissal." *Id.* at 1352. To the extent *Fiske* intended to incorporate *Lujan*'s balancing test in situations such as this one where the relator failed to file the initial complaint under seal, this Court finds it to be unpersuasive.

ground that the relator had failed to comply with the *qui tam* statute's mandatory filing and service requirements. *Erickson ex rel. United States v. American Inst. of Biological Scis.*, 716 F. Supp. 908, 910 (E.D. Va. 1989). The primary basis for the court's decision was that "a party pursuing a statutory remedy must comply with all the procedures the statute mandates." *Id.* at 911 (citing *United States ex rel. Tex. Portland Cement Co. v. McCord*, 233 U.S. 157, 162 (1913); *Reich v. Dow Badische Co.*, 575 F.2d 363 (2d Cir.), *cert. denied*, 439 U.S. 1006 (1978)). The court also noted that "[s]ound policy also supports dismissal" insofar as the relator's failure to comply with the statutory procedural provisions "irreversibly frustrate[d] the congressional goals underlying those provisions," including the goals of (1) "allow[ing] the government first to ascertain in private whether it was already investigating the claims stated in the suit and then to consider whether it wished to intervene"; (2) "prevent[ing] alleged wrongdoers from being tipped off that they were under investigation"; and (3) "rectify[ing] a statutory anomaly 'under which the defendant may be forced to answer the complaint two days after being served, without knowing whether his opponent will be a private litigant or the Federal government.' " *Id.* at 912 (citing S. Rep. No. 345, 99th Cong., 2d Sess., 24, reprinted in 1986 U.S.C.C.A.N. 5266, 5289).

Several years after *Erickson* but just before *Lujan* was issued, the Second Circuit was presented with a situation in which the relators had failed to comply with *any* of the seal provisions in the statute: They did not file the complaint under seal or *in camera*; they did not serve the United States with a copy of the complaint and other material evidence and

information in their possession; and, within hours of filing their complaint, they arranged for an interview with a local reporter which resulted in a newspaper article published two days later, revealing the substance of the complaint, the fact of prior discussions with government officials about their allegations, as well as other disclosures. *United States ex rel. Pilon v. Martin Marietta Corp.*, 60 F.3d 995, 997 (2d Cir. 1995). Upon review of the defendant's motion to dismiss the complaint with prejudice, the Second Circuit held that the relators' failure to comply with the statutory requirements "incurably frustrated" all the interests protected by the statute—those addressed in the legislative history of the Act as well as others that were not—and that, consequently, dismissal of the complaint with prejudice was required.[5]

Secondarily, the Second Circuit found that dismissal with prejudice was "supported not only by policy considerations . . . but also by pertinent authority," namely *McCord*, *Reich* as well as *Erickson*. *Id.* at 999 (quoting *McCord*, 233 U.S. at 162–63 (as holding that when a statute "creates a new liability and gives a special remedy for it, . . . the limitations upon such liability become a part of the right conferred, and compliance with them is made essential to the assertion and benefit of the liability itself"); *Reich*, 575 F.2d at 367–70 (as standing for the

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[5] The court referenced the same legislative history as *Erickson*. The Second Circuit also observed that the seal provisions served other functions not addressed in the FCA's legislative history, including to protect defendants' reputations in the event of the filing of meritless *qui tam* actions and to foster speedy settlements.

principle that failure to comply with statutory procedural requirements attendant to bringing complaint alleging age discrimination warrants grant of summary judgment in favor of defendants absent circumstances that might excuse failure); and *Erickson*, 716 F. Supp. at 912). The court expressly declined to consider whether the relators' "failure to comply with the procedural requirements of § 3730(b)(2) [posed] a question of subject matter jurisdiction," *id.* at 999 n.4.[6]

The Sixth Circuit has not directly addressed the question of whether the seal requirements of § 3730(b)(2) are jurisdictional or whether failure to comply with them upon the initial filing of a lawsuit must always result in dismissal. However, in a cursory opinion referencing *Pilon* about a year after its issuance, the Sixth Circuit affirmed the district court's summary judgment in favor of the defendant on the basis that the relator had ignored the FCA's filing requirements. *See Hackett v. Martin Marietta Corp.*, No. 95-6494, 1996 WL 577628, at *1 (6th Cir. Oct. 7, 1996) ("Summary judgment was also proper on the claim under the False Claims Act, as [plaintiff] complied with none of the requirements for filing a *qui tam* claim." (citing *Pilon*, 60 F.3d at 997–1000)).

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[6] The court also noted that the relators' counsel's "marginal efforts" to ensure the complaint would be filed under seal and, upon discovering it had not been filed under seal, his allowing his clients to give a detailed interview about the action shortly after it had been filed, "reveal[ed] . . . a considerable lack of good faith." *Id.* at 999. Its decision, however, did not rely on a factual finding of bad faith or willfulness.

The only district court within the Sixth Circuit to consider the issue, *United States ex rel. Fellhoelter v. Valley Milk Products, L.L.C.*, No. 3:05-CV-343, 2008 WL 217116 (E.D. Tenn. Jan. 24, 2008), reached the same conclusion, though it purported to reject *Pilon*'s and *Erickson*'s reliance on a finding that failure to comply with the statutory seal provisions frustrated the congressional goals underlying those provisions. It simply held instead that where the mandatory sealing provisions of the FCA are violated, the plaintiff loses his right to bring a statutory cause of action. *Id.* at *4 (citing *Blenstroub v. Harris Tube Pulling & Mfg., Inc.*, No. Civ-1-89-560, slip op. at 5 (E.D. Tenn. Oct. 13, 1992)).

The *Fellhoelter* court did not specifically identify whether its holding was based upon lack of subject-matter jurisdiction resulting from the procedural default. Defendant here, however, interprets the *Fellhoelter* holding as jurisdictional in nature, and urges this Court to adopt the same rationale. This Court, like *Pilon*, finds it unnecessary to reach that question.[7] Instead, the Court holds that Summers'

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[7] It appears that most courts to consider the question, though not all, have concluded or at least assumed that procedural requirements of § 3730(b)(2) are not jurisdictional. This Court, if it were required to make an express finding on this issue, would find persuasive the analysis employed by the Eastern District of Virginia in *United States ex rel. Ubl v. IIF Data Solutions*, No. 1:06-cv-641, 2009 WL 1254704 (E.D. Va. May 5, 2009). There, the relator filed his original complaint *in camera* and under seal. After the Government gave notice that it declined to intervene, the court ordered the complaint (and the matter as a whole) unsealed and served upon the defendants. After the defendants were served, they filed a motion to dismiss under Rule 9(b) of the Federal Rules of Civil Procedure, alleging that the allegations of

fraud in the complaint were not pleaded with sufficient specificity. The court granted the motion and dismissed the complaint without prejudice, giving the relator leave to amend his complaint. The relator thereafter filed his amended complaint, this time not under seal or *in camera*. The parties then engaged in active litigation for another two years before the defendants filed their motion to dismiss for lack of subject-matter jurisdiction based upon the relator's failure to file the amended complaint under seal. The court denied the motion, finding, after a comprehensive analysis of the question, that the requirements of § 3730(b)(2) were not jurisdictional and that, under the specific circumstances presented there, the policy arguments supporting dismissal for failure to comply with the filing and service requirements were no longer applicable. Worthy of particular emphasis is the *Ubl* court's finding that "[i]f the filing and service requirements were jurisdictional prerequisites, the proper remedy for a relator's failure to comply with them—in all cases—would be dismissal of the complaint with prejudice." *Id.* at *3 (citing *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006) ("[W]hen a federal court concludes that it lacks subject-matter jurisdiction, the court must dismiss the complaint in its entirety.")). Thus, if the requirements were jurisdictional, the relator's procedural default would result in dismissal with prejudice as to the United States as well, thereby depriving the government—the real party-in-interest—of the opportunity to pursue the litigation if it so chose. *Id.* The court concluded: "Given the finality of dismissal where a court lacks subject matter jurisdiction, it seems that had Congress wished to make a court's jurisdiction contingent upon a relator's compliance with these procedural requirements, it would have done so explicitly." *Id.* (footnote omitted) (citing *Arbaugh*, 546 U.S. at 515–16). *Cf. United States ex rel. Maxfield v. Wasatch Constructors*, No. 2:99-CV-00040 PGC, 2005 U.S. Dist. LEXIS 10162, *12–*14 (D. Utah May 27, 2005) (finding that the requirement contained in 31 U.S.C. § 3730(b)(2) that the relator serve the government with a "written disclosure" statement at the start of a *qui tam* action was not jurisdictional, such that the relator's failure to comply with it was not fatal to his ability to bring the action); *Castenson v. City of Harcourt*, 86 F. Supp. 2d 866, 877–78 (N.D. Iowa 2000) (where the record did not indicate that plaintiffs had complied with § 3730(b)(2) but no party had

failure in this case to file her complaint *in camera* and under seal is a fatal deficiency that requires dismissal of this action with prejudice as to the relator (without prejudice to the United States), both because her failure to comply with the statute deprives her of the ability to pursue the remedy created by the statute, and because the same failure incurably frustrates the underlying purposes of the procedural requirements. This holding should not be construed as a "sanction." As previously indicated, this Court finds that the presence or absence of bad faith on the part of the relator is simply not material.[8] Likewise, while the

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actually raised an objection based on that deficiency, the court concluded that § 3730(b)(2) requirements were procedural preconditions rather than jurisdictional prerequisites, such that objection to them could be waived). *But see Friedman v. Fed. Dep. Ins. Corp.*, No. 93-277, 1995 U.S. Dist. LEXIS 15460, at *8 (E.D. La. Oct. 13, 1995) ("The Government argues that this *in camera* filing requirement is jurisdictional and that the intervenors' dereliction in this regard warrants dismissal. The Court agrees." (citing *Erickson v. Am. Inst. of Biological Scis.*, 716 F. Supp. 908, 911 (E.D. Va. 1989)).

[8] The Court notes that counsel's purported efforts to file the matter in compliance with the statute were undoubtedly insufficient. *Cf. United States ex rel. Le Blanc v. ITT Indus., Inc.*, 492 F. Supp. 2d 303, 306 (S.D.N.Y. 2007) (dismissing the action without prejudice as to the relator based upon the relator's failure to file his complaint under seal, and noting: "[T]he responsibility for following the requirements of the False Claims Act falls on the party commencing the action, not on the Clerk of Court."); *United States v. Fiske*, 968 F. Supp. 1347, 1352 (E.D. Ark. 1997) (where the relator, who was a licensed attorney, claimed he had advised the clerk to file the case in accordance with the requirements of § 3730(b)(2) but the clerk had "decided" not to follow his instructions, the court noted, "It is the opinion of the Court that allowing the clerk to file a complaint in violation of clear statutory

United States indicates that there is a "possibility that [its] investigation will be harmed by the seal's breach" as a result of its inability now "to explore certain covert methods of investigation," there is no way to ascertain whether the United States has been "actually harmed" as the *Lujan* balancing test would have required.

This Court does not reach the question of whether the fraud allegations are pleaded with sufficient specificity, and Summers' motion to amend her complaint will be denied as moot given that the proposed amendment would be futile.

D. The Request for Attorneys' Fees

Defendant LHC seeks attorneys' fees under 31 U.S.C. § 3730(d)(4), which permits an award of attorneys' fees to a prevailing defendant if the Government opts not to proceed with the action and if "the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment." Because the matter is subject to dismissal as a result of a procedural default rather than a substantive deficiency and there is no indication in the record as to whether the United States will choose to bring claims based on the same or related allegations, the Court has no basis for finding that the claim brought is clearly frivolous or vexatious, or brought primarily for the purposes of harassment. LHC's request for an award of attorneys' fees will therefore be denied.

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requirements because the clerk "decided" to disregard a verbal request is an unreasonable response from a licensed attorney.")

An appropriate order as to the Motion to Dismiss will enter.

/s/ Thomas A Wiseman, Jr.
Thomas A. Wiseman, Jr.
Senior U.S. District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE NASHVILLE DIVISION

Civil Action No. 3:09-cv-277
Judge Thomas A. Wiseman, Jr.

[Filed June 11, 2009]

UNITED STATES OF AMERICA *ex rel.* SALLY CHRISTINE SUMMERS,	)
Plaintiff,	)
v.	)
LHC GROUP, INC.,	)
Defendant.	)

ORDER

Before the Court is defendant LHC Group, Inc.'s Motion to Dismiss Complaint and for Attorneys' Fees (Doc. No. 7). For the reasons discussed in the accompanying Memorandum Opinion, the motion to dismiss is hereby **GRANTED** and this matter is **DISMISSED WITH PREJUDICE AS TO RELATOR SALLY CHRISTINE SUMMERS**, but without prejudice to the United States' ability to pursue the same or related claims against LHC should it choose to do so. The request for attorneys' fees is **DENIED**.

Costs are taxed to the relator, Sally Christine Summers.

It is so **ORDERED**.

This is a final judgment for purposes of Fed. R. Civ. P. 58 from which an appeal may lie.

/s/ Thomas A. Wiseman, Jr.
Thomas A. Wiseman, Jr.
Senior U.S. District Judge

APPENDIX C

DENIED for the reasons set forth in the previous Memo and Judgment.

/s/ Thomas A. Wiseman, Jr.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

No. 3:09-0277
JUDGE WISEMAN

[Filed July 8, 2009]

UNITED STATES OF AMERICA ex rel SALLY CHRISTINE SUMMERS,	)
Plaintiff,	)
v.	)
LHC GROUP, INC.	)
Defendant.	)

PLAINTIFF'S MOTION TO ALTER JUDGMENT

Comes the Plaintiff pursuant to Fed. R. Civ. Pro. Rule 59 (e) and request that this Honorable Court alter or amend its Judgment entered June 11, 2009 (Docket

Entry No. 36). For grounds the Plaintiff would submit unto the Court that:

1. The Court should reconsider the circumstances surrounding the failure of the Plaintiff to file the original Complaint under seal.

2. That the Court should reconsider the standard of law applied to the instant case given the nature of the facts.

In support of this motion that the Plaintiff relies on her Memorandum Brief and the Affidavit of her attorney, Phillip L. Davidson.

FILED

No. 10-827

IN THE

Supreme Court of the United States

UNITED STATES, ex rel.
SALLY CHRISTINE SUMMERS,

Petitioner,

v.

LHC GROUP, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a *qui tam* Relator's failure to file her complaint under seal in violation of the False Claims Act's filing requirements warrants dismissal, as the Sixth Circuit held.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent LHC Group, Inc. is publicly traded under the symbol LHCG. It does not have a parent corporation, and there is no publicly held company that owns 10% or more of its stock.

STATEMENT OF THE CASE

Petitioner Sally Christine Summers initiated this action on March 20, 2009 by filing a purported *qui tam* action under the federal False Claims Act, 31 U.S.C. § 3728 *et* seq. ("FCA"), on behalf of the United States, against Respondent LHC Group, Inc. Pet. App. 3a. Petitioner admits that she failed to file the Complaint under seal as required by the FCA. As a result of the failure to follow the requirements for filing a complaint under seal, the Complaint was posted on PACER, the publicly-accessible Internet-based portal providing access to court filings, on March 24, 2009. Pet. App. 4a; *see* 31 U.S.C. § 3730(b)(2) ("[An FCA *qui tam*] complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders.").

Respondent filed a motion to dismiss based on Petitioner's failure to follow the FCA's statutory filing requirements. Pet. App. 3. The District Court granted LHC's motion to dismiss, holding that Petitioner's "failure to comply with the statute deprives her of the ability to pursue the remedy created by the statutes, and because the same failure incurably frustrates the underlying purpose of the procedural requirements." Pet. App. 47a. The Sixth Circuit affirmed the District Court's dismissal, holding that the FCA's statutory filing requirement is a mandatory prerequisite to filing. Pet. App. 23a ("An FCA plaintiff who cannot satisfy those [filing] conditions, like Summers, cannot bring suit in the name of the Government and has no basis for recovery.").

Petitioner seeks *certiorari* on the purported basis that the Sixth Circuit's decision conflicts with the Ninth

Circuit's decision in *United States ex rel. Lujan v. Hughes Aircraft Co.*, 67 F.3d 242 (9th Cir. 1995). In that case, the Ninth Circuit held that a *post-filing* breach of the seal requirement does not automatically mandate a dismissal. *Id.* at 245-47. Instead, the Ninth Circuit engaged in a three-step balancing test to determine whether the complaint should be dismissed.

REASONS FOR DENYING THE PETITION

Supreme Court Rule 10 states that "[r]eview on a writ of certiorari is not a matter of right, but of judicial discretion...[and] will be granted only for compelling reasons." By mis-stating the holding in *Lujan*, Petitioner erroneously claims a conflict exists among the Courts of Appeals on an "important matter." Sup. Ct. R. 10(a); Pet. App. 4. As demonstrated below, however, there is no conflict. The fact that the Sixth Circuit in this case affirmed dismissal where the Petitioner failed *initially* to file her complaint consistent with the False Claims Act's mandatory requirements and the Ninth Circuit engaged in a balancing test to determine if a *post-filing* breach of the seal warranted dismissal does not create any conflict.

I. The Sixth Circuit's Decision Does Not Conflict with the Decision of Any Other Court of Appeal

Petitioner does not cite to, and Respondent is not aware of, any case that conflicts with the Sixth Circuit's holding that the FCA's filing requirement is a mandatory prerequisite to filing an FCA *qui tam* complaint. *See also, e.g., United States ex rel. Pilon v. Martin Marietta Corp.*, 60 F.3d 995, 1000 (2d Cir. 1995) (abuse of discretion not to dismiss a *qui tam* action with prejudice where relator failed

to comply with the filing requirements). Instead, Petitioner posits that *Lujan*, in which the Ninth Circuit fashioned a balancing test (rather than authorizing automatic dismissal) for courts faced with an improper *post-filing* disclosure, cannot be "analytically distinguished from the case at bar" and therefore creates a conflict among the Courts of Appeal. Pet. App. 4. Yet in *Lujan* the relator satisfied the statutory requirements for filing under seal whereas Petitioner here did not. *See Lujan*, 67 F.3d at 243 ("Pursuant to § 3730(b)(2), Lujan filed her claim *in camera*, and served it on the Government along with the requisite written disclosure of information."). The *Lujan* relator violated the FCA's seal provisions by improperly disclosing information regarding the lawsuit sometime after she properly filed her complaint. As the district court in this case noted:

> "The factual context of *Lujan* is distinguishable from that of the case at bar, however, insofar as *Lujan* involved a post-filing violation of the seal requirement. The Ninth Circuit itself recognized that the violation there was 'qualitatively different than the violations in cases that have found dismissal was an appropriate sanction.'"

App. Pet. 40a.

The Sixth Circuit speculated, in dicta, that a court following *Lujan* might apply a balancing test, rather than issue a dismissal, to a *qui tam* complaint not filed under seal. Pet. App. 17a. This may or may not be true – but it was not the express holding in *Lujan* nor is it the case before this Court. *Certiorari* is not granted to

resolve inconsistencies in dicta, but to resolve differences in judgments. *See California v. Rooney*, 483 U.S. 307, 311, 107 S.Ct. 2852, 2854 (1987) ("This Court 'reviews judgments, not statements in opinions.'"); E. Gressman, K. Geller, S. Shapiro, T. Bishop, & E. Hartnett, Supreme Court Practice 241 (9th ed. 2007) ("[For certiorari to be granted] there must be a real or 'intolerable' conflict on the same matter of law or fact, not merely an inconsistency in dicta or in the general principles utilized").

This case and *Lujan* are not in conflict – and conflict on this matter will not arise unless and until a court decides not to dismiss an FCA *qui tam* complaint not properly filed under seal.

CONCLUSION

Because the Sixth Circuit correctly applied the laws governing the FCA, and because there is no conflict among the Courts of Appeal regarding the appropriate sanction for failure to file FCA *qui tam* complaints under seal, the petition for writ of *certiorari* should be denied.

Respectfully submitted,

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No. 10-827

In the Supreme Court of the United States

UNITED STATES OF AMERICA EX REL. SALLY CHRISTINE SUMMERS, PETITIONER

v.

LHC GROUP, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether the False Claims Act (FCA), 31 U.S.C. 3729 *et seq.*, mandates automatic dismissal of a *qui tam* suit in which the relator fails to comply with the FCA's requirement (see 31 U.S.C. 3730(b)(2)) that the complaint be filed under seal.

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In the Supreme Court of the United States

No. 10-827

UNITED STATES OF AMERICA, EX REL. SALLY CHRISTINE SUMMERS, PETITIONER

v.

LHC GROUP, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

This brief is filed in response to the Court's order inviting the Acting Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

1. The False Claims Act (FCA), 31 U.S.C. 3729 *et seq.*, imposes civil liability when a person submits a false claim in order to secure a payment from the federal government.[1] The Attorney General may bring a civil action

[1] After this lawsuit was filed, Congress twice amended the FCA. See Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21,

if he finds that a person has violated the FCA. 31 U.S.C. 3730(a). Alternatively, a private person (known as a "relator") may bring a *qui tam* action "for the person and for the United States Government." 31 U.S.C. 3730(b)(1); see, *e.g.*, *United States ex rel. Eisenstein* v. *City of New York*, 129 S. Ct. 2230, 2232 (2009). If a *qui tam* action results in the recovery of damages or civil penalties, the award is divided between the government and the relator. 31 U.S.C. 3730(d).

The FCA provides that *qui tam* complaints must be filed *in camera* and served on the government along with written disclosures of all material evidence and information the relator possesses. 31 U.S.C. 3730(b)(2). The complaint is not to be served on the defendant at the time of filing, and the case must remain under seal for at least 60 days while the government determines whether to intervene and proceed with the action. *Ibid.* Those procedural requirements are intended to provide the government with an opportunity to investigate the allegations and make an informed decision regarding whether to intervene in the action before the defendant becomes aware of the case. S. Rep. No. 345, 99th Cong., 2d Sess. 24 (1986) (*Senate Report*).

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123 Stat. 1617; Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 10104(j)(2), 124 Stat. 119. With certain exceptions not relevant here, these amendments "make[] no mention of retroactivity, which would be necessary for [their] application to pending cases." *Graham County Soil and Water Conservation Dist.* v. *United States*, 130 S. Ct. 1396, 1400 n.1 (2010); see *Schindler Elevator Corp* v. *United States ex rel. Kirk*, No. 10-188, slip op. 1 n.1 (May 16, 2011). In any event, the amendments do not affect the FCA provision (31 U.S.C. 3730(b)(2)) that is at issue in this case.

The defendant is not required to respond to an FCA complaint until 20 days after it is unsealed and served on the defendant. 31 U.S.C. 3730(b)(3). If the Attorney General declines to intervene in the suit, "the person bringing the action shall have the right to conduct the action." 31 U.S.C. 3730(b)(4)(B).

2. a. On March 20, 2009, petitioner Sally Christine Summers filed her *qui tam* complaint in this case. Petitioner alleged, *inter alia*, that while she was employed as a physical therapist by respondent, respondent routinely recommended, provided, and billed Medicare for health services that respondent's managers knew were unnecessary, in violation of the FCA. She also alleged that respondent had discharged her in retaliation for bringing that fraudulent conduct to respondent's attention. In accordance with Section 3730(b)(2), petitioner served the complaint on the United States and not on the defendant. Petitioner failed, however, to comply with Section 3730(b)(2)'s additional requirement that the complaint be filed *in camera* and remain under seal. Pet. App. 34a-35a & n.2.

According to an affidavit that was subsequently filed by petitioner's attorney, an employee of the district court clerk's office contacted the attorney shortly after the *qui tam* complaint was filed to inquire whether the complaint should be placed under seal. The employee allegedly told petitioner's counsel that the complaint "would not be logged into the [Electronic Case Filing] system until [counsel] and the Clerk's Office had discussed the proper filing method." Pet. App. 4a (quoting Pet. C.A. Br. 6). On March 23, 2009, the clerk's office employee left the attorney a voicemail stating that, in order to file the complaint under seal, counsel needed to

send the clerk an e-mail making that request. When petitioner's counsel subsequently called the clerk's office to confirm the relevant e-mail address, he was told by another employee that he would need to file a motion to seal the case rather than send an e-mail. *Id.* at 3a-4a, 34a-35a.

The next day, before petitioner's lawyer had filed any motion, the district court posted the complaint online via PACER, a publicly accessible internet portal for court filings. On March 26, 2009, an Assistant United States Attorney called petitioner's counsel to notify him that the United States Attorney's Office had seen the case on PACER. On March 27, 2009, petitioner's counsel filed a motion to seal the case, but the motion was denied three days later on the ground that it failed to explain why the case should be sealed. Pet. App. 4a, 35a-36a.

b. The district court granted respondent's motion to dismiss the complaint with prejudice for failure to comply with Section 3730(b)(2)'s filing-under-seal requirement. Pet. App. 32a-51a. Petitioner relied on *United States ex rel. Lujan* v. *Hughes Aircraft Co.*, 67 F.3d 242 (1995), cert. denied, 534 U.S. 1040 (2001), in which the Ninth Circuit applied a balancing test to determine the appropriate sanction for non-compliance with Section 3730(b)(2)'s seal requirement. The district court in this case declined to follow that approach. Describing *Lujan* as involving a post-filing violation of the seal requirement, the court found the balancing test "inappropriate in the present context, particularly given that the requisite seal was never in place." Pet. App. 40a-41a. Although the district court did not decide whether Section 3730(b)(2)'s requirements are jurisdictional (*id.* at 45a), it held that petitioner's failure to file the complaint un-

der seal "is a fatal deficiency that requires dismissal of this action with prejudice as to the relator (without prejudice to the United States), both because her failure to comply with the statute deprives her of the ability to pursue the remedy created by the statute, and because the same failure incurably frustrates the underlying purposes of the procedural requirements" (*id.* at 47a).

3. The court of appeals affirmed. Pet. App. 1a-31a.[2]

The court of appeals recognized that "the primary purpose of the under-seal requirement is to permit the Government sufficient time in which it may ascertain the status quo and come to a decision as to whether it will intervene in the case filed by the relator." Pet. App. 10a, 12a n.4; see *id.* at 29a-31a (Keith, J., concurring in the result). The court of appeals also rejected respondent's (and the district court's) effort to distinguish the Ninth Circuit's decision in *Lujan*. *Id.* at 15a-17a. The court explained that, under the Ninth Circuit's reasoning in *Lujan*, the balancing test would apply "regardless of whether the alleged breach occurred after filing or due to a failure to file *in camera* altogether." *Id.* at 17a.

The court of appeals nevertheless declined to follow *Lujan*, holding instead that dismissal of the complaint is the only appropriate sanction for "violations of the procedural requirements imposed on *qui tam* plaintiffs under the False Claims Act." Pet. App. 18a. The court explained that, in fashioning the seal requirement, "Congress clearly identified the factors it found relevant and considered the tension between them, and decided that a sixty-day *in camera* period was the correct length

[2] The court of appeals did not disturb the district court's conclusion that the dismissal was without prejudice to the United States. Pet. App. 24a. That issue is not in dispute before this Court.

of time required to balance those factors." *Id.* at 19a. The court acknowledged that in some cases, "a disclosure might turn out to be relatively benign." *Id.* at 22a. The court concluded, however, that "[r]equiring violations of the FCA's under-seal requirement to be subjected to a balancing test * * * both misses the point of the requirement itself and potentially encourages plaintiffs to comply with the FCA's underseal requirement only to the point the costs of compliance are outweighed by the risk that any given violation would turn out to be severe enough to require dismissal." *Id.* at 22a-23a.

Judge Keith concurred in the result. Pet. App. 26a-31a. Although Judge Keith agreed with the majority's reading of the FCA, see *id.* at 29a, he acknowledged that the Ninth Circuit in *Lujan* and the Second Circuit in *United States ex rel. Pilon* v. *Martin Marietta Corp.*, 60 F.3d 995 (1995), "have adopted an approach that determines whether to dismiss an improperly filed complaint on a case by case basis, as opposed to the *per se* rule adopted here." Pet. App. 26a. Judge Keith further explained that Congress had imposed the sealing requirement to protect the government's ability to investigate the relator's allegations, not "to safeguard the defendant's interest in not being improperly defamed." *Id.* at 29a; see *id.* at 29a-31a.

DISCUSSION

The court of appeals held that dismissal of a relator's *qui tam* complaint is the mandatory sanction for noncompliance with 31 U.S.C. 3730(b)(2)'s requirement that the complaint be filed under seal. Section 3730(b)(2)'s text and purpose do not support that rule. The Sixth

Circuit's inflexible approach is also inconsistent with the background understanding that courts ordinarily possess broad discretion to determine the appropriate sanction for violations of similar procedural requirements. The decision below also conflicts with the Ninth Circuit's decision in *United States ex rel. Lujan* v. *Hughes Aircraft Co.*, 67 F.3d 242 (1995), cert. denied, 534 U.S. 1040 (2001), and it is in tension with the Second Circuit's decision in *United States ex rel. Pilon* v. *Martin Marietta Corp.*, 60 F.3d 995 (1995).

For all of those reasons, the question presented warrants resolution by this Court. The present case does not provide a suitable vehicle, however, because petitioner's suit (at least in substantial part) appears to be subject to dismissal for lack of jurisdiction under a different provision of the FCA, the first-to-file bar of 31 U.S.C. 3730(b)(5). The petition for a writ of certiorari therefore should be denied.

A. The Court Of Appeals Erred In Creating A Per Se Rule Mandating Dismissal Of A *Qui Tam* Suit Where The Relator Fails To Comply With Section 3730(b)(2)'s Seal Requirement

1. Where, as here, a statute establishes a procedural rule without specifying the consequences of a violation, this Court looks "to statutory language, to the relevant context, and to what they reveal about the purposes that [the requirement at issue] is designed to serve." *Dolan* v. *United States*, 130 S. Ct. 2533, 2538 (2010). Those sources do not support the court of appeals' holding that the FCA requires automatic dismissal of a *qui tam* complaint when a relator violates Section 3730(b)(2)'s seal requirement. Rather, as is typically the case when seal-

ing requirements are violated, the district court possesses broad discretion to choose an appropriate sanction.

a. In its entirety, Section 3730(b)(2) states:

> A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government pursuant to Rule 4(d)(4) of the Federal Rules of Civil Procedure. The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. The Government may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information.

31 U.S.C. 3730(b)(2).

As a general rule, "when Congress does not rank a statutory limitation * * * as jurisdictional, courts should treat the restriction as nonjurisdictional in character." *Arbaugh* v. *Y&H Corp.*, 546 U.S. 500, 516 (2006). Neither Section 3730(b)(2) nor any other provision in the FCA indicates that the specified requirements are jurisdictional, and compliance with applicable sealing requirements is not typically treated as a prerequisite to the court's exercise of jurisdiction. See pp. 12-13, *infra*. None of the courts of appeals that have addressed the question presented—including the Sixth Circuit below—has held that a relator's failure to comply with Section 3730(b)(2) deprives the district court of jurisdiction over the complaint. To the contrary, both the Sixth Circuit (Pet. App. 6a n.2) and the Second Circuit (*Pilon*, 60 F.3d at 999-1000 nn.4-5) have expressed skepticism

about the contention that the seal requirement is jurisdictional, and the Ninth Circuit (*Lujan*, 67 F.3d at 245) has squarely rejected that contention.

In addition, neither Section 3730(b)(2) nor any other provision in the FCA states that a *qui tam* complaint must be dismissed if the relator fails to comply with Section 3730(b)(2)'s seal requirement. Indeed, the FCA says nothing at all about the appropriate sanction for such a breach. In *Hallstrom* v. *Tillamook County*, 493 U.S. 20 (1989), this Court held that the plaintiff's failure to comply with the Resource Conservation and Recovery Act's 60-day notice requirement mandated dismissal of the suit because the Act provided that "[n]o action may be commenced" unless that requirement was satisfied. *Id* at 25-26 (quoting 42 U.S.C. 6972(b)(1) (1982)). Section 3730(b)(2) contains no comparable language, but simply states in relevant part that the complaint "shall be filed in camera" and "shall remain under seal for at least 60 days." 31 U.S.C. 3730(b)(2); cf. *Scarborough* v. *Principi*, 541 U.S. 401, 405-406 (2004) (holding that dismissal was not required despite plaintiff's initial failure to comply with the Equal Access to Justice Act's instruction that an applicant for attorney fees "shall also allege that the position of the United States was not substantially justified").

b. The court of appeals concluded that a rule of automatic dismissal would further the purposes that Congress sought to protect by enacting the seal requirement. See Pet. App. 19a-23a. That analysis was misconceived. Although dismissal will sometimes be the appropriate sanction for a relator's failure to file his FCA complaint under seal, the rigid rule announced by the

court of appeals would disserve the purposes of the FCA and the interests of the United States.

The FCA was enacted in 1863 to prevent and deter fraud arising out of Civil War defense contracts. Act of Mar. 2, 1863, ch. 67, 12 Stat. 696; see *United States* v. *McNinch*, 356 U.S. 595, 599 (1958) ("Testimony before the Congress painted a sordid picture of how the United States had been billed for nonexistent or worthless goods, charged exorbitant prices for goods delivered, and generally robbed in purchasing the necessities of war. Congress wanted to stop this plundering of the public treasury."). In order to ensure enforcement of the FCA despite limited governmental resources, Congress included *qui tam* provisions permitting private individuals (*i e.*, relators) to bring suit on behalf of the United States. See *United States ex rel Marcus* v. *Hess*, 317 U.S. 537, 540 (1943). Because relators who bring successful suits receive a portion of the proceeds, the *qui tam* provisions create an incentive for private citizens to uncover and prosecute fraud against the federal government. See, *e.g.*, *ACLU* v. *Holder*, No. 09-2086, 2011 WL 1108252, at *2 (4th Cir. Mar. 28, 2011) (observing that the *qui tam* provisions "let loose a posse of ad hoc deputies to * * * supplement the government's regular troops") (internal quotation omitted).

In 1986, as part of a comprehensive revision of the FCA, Congress amended the Act's *qui tam* provisions with the "overall intent" of "encourag[ing] more private enforcement suits." *Senate Report* 23-24. Congress recognized, however, that a proliferation of *qui tam* suits could potentially hinder the government's own investigative and enforcement efforts. The Senate Report explained:

> The Justice Department raised a concern * * * that a greater number of private suits could increase the chances that false claims allegations in civil suits might overlap with allegations already under criminal investigation. The Justice Department asserted that the public filing of overlapping false claims allegations could potentially "tip off" investigation targets when the criminal inquiry is at a sensitive stage. While the Committee does not expect that disclosures from private false claims suits would often interfere with sensitive investigations, we recognize the necessity for some coordination of disclosures in civil proceedings in order to protect the Government's interest in criminal matters.

Ibid. In response to that concern, Congress enacted Section 3730(b)(2) (including the seal requirement) "to allow the Government an adequate opportunity to fully evaluate the private enforcement suit and determine both if that suit involves matters the Government is already investigating and whether it is in the Government's interest to intervene and take over the civil action." *Ibid.*[3]

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[3] Neither the statutory text nor the legislative history suggests that Congress also intended the seal requirement to protect the rights of defendants. To the contrary, the Senate Report stated that "[b]y providing for sealed complaints, the Committee does not intend to affect defendants' rights in any way." *Senate Report* 24; see *Lujan*, 67 F.3d at 247 (observing that "protecting the rights of defendants is not an appropriate consideration when evaluating the appropriate sanction for a violation of the seal provision"); Pet. App. 12a n 4 ("[W]e have found no support in the legislative history * * * for the proposition that [protecting defendants' rights] was one of the purposes of the

The Sixth Circuit's mandatory dismissal rule does not comport with Congress's intent that Section 3730(b)(2) support the government's investigative and enforcement efforts. If the government does not believe it has been prejudiced by a particular violation of the seal requirement and desires the *qui tam* litigation to proceed, the decision below would disserve the weighty interests protected by the statute and grant a windfall to the defendant by mandating dismissal of the complaint. Accordingly, the Sixth Circuit's blunt, mandatory dismissal rule is not appropriately tailored to the statutory purposes behind the FCA.

2. a. The Sixth Circuit was likewise wrong in characterizing "a *Lujan*-style balancing test" as "a form of judicial overreach." Pet. App. 18a. If Congress had directed courts to dismiss *qui tam* complaints that are not filed under seal, it would indeed be inappropriate for courts to fashion their own exceptions to that mandate. But in the absence of specific statutory direction, courts ordinarily have significant discretion to determine whether dismissal is the appropriate sanction for noncompliance with a procedural rule or statutory requirement. See, *e.g.*, *Chambers* v. *NASCO, Inc.*, 501 U.S. 32, 43-45 (1991) (recognizing a district court's "discretion * * * to fashion an appropriate sanction for conduct which abuses the judicial process," including but not limited to "outright dismissal of a lawsuit").

With respect to violations of seal requirements in particular, trial courts regularly and appropriately impose sanctions other than dismissal of a complaint. See,

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under-seal requirement.") (emphasis omitted); *id.* at 29a-31a (Keith, J., concurring in the result).

e.g., *Greiner* v. *City of Champlin*, 152 F.3d 787, 789-790 (8th Cir. 1998) (upholding award of monetary sanctions against plaintiff's attorney for violating seal); *Grove Fresh Distrib., Inc.* v. *John Labatt, Ltd*, 134 F.3d 374 (7th Cir.) (affirming district court's imposition of monetary contempt sanctions against plaintiff's counsel for violating seal) (table), cert. denied, 525 U.S. 877 (1998); *Coleman* v. *American Red Cross*, 23 F.3d 1091, 1094-1096 (6th Cir. 1994) (holding that although plaintiff's attorney intentionally violated protective order, dismissal was too harsh a sanction absent evidence of prejudice). Dismissal is ordinarily reserved for egregious or bad-faith violations. See, *e.g.*, *Toon* v. *Wackenhut Corr. Corp.*, 250 F.3d 950, 952-953 (5th Cir. 2001) (dismissal is appropriate sanction for seal violation only if plaintiff acted in "bad faith"); *Marrocco* v. *General Motors Corp.*, 966 F.2d 220, 224 (7th Cir. 1992) (dismissal of suit appropriate because plaintiff's violation of protective order constituted "contumacious conduct"); see also *Cohen* v. *Longshore*, 621 F.3d 1311, 1314 (10th Cir. 2010) ("Although a district court has the discretion to dismiss a case with prejudice for the failure to comply with the rules of civil procedure or the court's orders, the court does not exercise its discretion soundly unless it first considers certain criteria—specifically, (1) the degree of actual prejudice to the defendant; (2) the amount of interference with the judicial process; (3) the culpability of the litigant; (4) whether the court warned the party in advance that dismissal of the action would be a likely sanction for noncompliance; and (5) the efficacy of lesser sanctions.") (internal quotation and citation omitted).

In light of that background understanding, Congress's silence as to the sanction for a violation of Section 3730(b)(2) does not imply a per se rule of dismissal.

b. The Sixth Circuit also suggested that a balancing approach might "encourage[] plaintiffs to comply with the FCA's underseal requirement only to the point the costs of compliance are outweighed by the risk that any given violation would turn out to be severe enough to require dismissal." Pet. App. 22a-23a. The court believed that under such a regime, "the extent of a plaintiff's compliance with the FCA's under-seal requirement would become subject to the same risk analysis as any other litigation tactic, an analysis in which it would be the plaintiff's, not the Government's, interests that were paramount." *Id.* at 23a. But if a particular violation of Section 3730(b)(2)'s seal requirement appears to follow from the sort of calculation the court hypothesized, the willful nature of the violation will weigh in favor of dismissal. See *Lujan*, 67 F.3d at 246. In addition, the government can and does provide courts with information to help determine whether the government's investigatory and enforcement efforts have been compromised by a particular breach of Section 3730(b)(2).

If the government informs the court that its interests have not been prejudiced by the violation and that it desires the litigation to proceed, the court should give that assessment due weight. The Sixth Circuit's approach, by contrast, requires dismissal even in cases where the violation is inadvertent and the government believes that continued prosecution of the *qui tam* suit would further its own enforcement interests. And in any event, the possibility of strategically-motivated violations does not distinguish Section 3730(b)(2) from other

sealing requirements or procedural rules, as to which district courts typically exercise broad remedial discretion.

B. The Courts Of Appeals Are Divided On The Question Presented

1. As the Sixth Circuit acknowledged, its ruling in this case conflicts with the Ninth Circuit's decision in *Lujan*. Pet. App. 15a-18a; see *id.* at 26a-29a (Keith, J., concurring in the result). The Ninth Circuit held that a relator's failure to comply with Section 3730(b)(2)'s seal requirement "does not per se require dismissal of the *qui tam* complaint." *Lujan*, 67 F.3d at 245. The Ninth Circuit instead identified three factors—(1) the extent to which the government was harmed by the violation; (2) the "relative severity" of the violation; and (3) whether the violation was willful or in bad faith—that the district court should consider in determining whether dismissal is an appropriate sanction for a breach of Section 3730(b)(2)'s sealing requirement. *Id.* at 245-246. The court below expressly rejected the Ninth Circuit's balancing test, holding instead that a *qui tam* plaintiff's failure to comply with Section 3730(b)(2) mandates automatic dismissal of the suit. Pet. App. 18a ("[H]aving the issue squarely before us, we decline to follow the *Lujan* court's analysis, and hold that violations of the procedural requirements imposed on *qui tam* plaintiffs under the False Claims Act preclude such plaintiffs from asserting *qui tam* status.").

Respondent seeks (Br. in Opp. 2-4) to distinguish the two decisions on the ground that *Lujan* involved a *post*-filing violation of Section 3730(b)(2), whereas petitioner's violation involved the filing of the complaint. But

while the *Lujan* relator's most serious violation of the seal requirement occurred when she described her complaint to a *Los Angeles Times* reporter after it had been filed under seal, see 67 F.3d at 244, the relator also violated the seal requirement before filing by disclosing to the defendant in that case her intent to pursue the *qui tam* action and the nature of her allegations, see *id.* at 245-246. In any event, the Ninth Circuit's rejection of a per se dismissal rule, and its adoption of a balancing test, did not depend on the timing of the seal violation. The court squarely held that "[t]he requirements of 3730(b)(2) are not jurisdictional, and violation of those requirements does not per se require dismissal of the *qui tam* complaint." *Id.* at 245. Indeed, the Ninth Circuit discussed the timing and extent of the violation only in the latter portion of the opinion when it applied the second factor of its balancing test, *i.e.*, the nature and severity of the violation. See *id.* at 246. Accordingly, as the Sixth Circuit acknowledged (Pet. App. 17a), *Lujan*'s balancing approach applies "regardless of whether the alleged breach occurred after filing or due to a failure to file in camera altogether, and to skirt the logic of *Lujan* by making that distinction would miss its import."

2. As Judge Keith noted (Pet. App. 28a-29a), the Sixth Circuit's decision is also in tension with the analysis of the Second Circuit in *Pilon*. The relators in *Pilon* failed to comply with Section 3730(b)(2)'s initial filing and service requirements, and then gave an interview about their *qui tam* complaint to a local newspaper. 60 F.3d at 997-998. Although the Second Circuit ultimately held that dismissal of the complaint was appropriate in that case because the relators' "failure to comply with the service and filing requirements incurably frus-

trated" Congress's purposes in enacting Section 3730(b)(2), the Second Circuit did not adopt a per se rule of dismissal. *Id.* at 998-999. Rather, in an analysis closely resembling *Lujan*'s balancing inquiry, the Second Circuit concluded that dismissal was warranted under the facts of the case because the government had been harmed by the relators' non-compliance, *id.* at 999, because the violations were "particularly egregious," *id.* at 998, and because the record revealed "a considerable lack of good faith" by relators' counsel, *id.* at 999. Indeed, the Ninth Circuit in *Lujan* relied in part on *Pilon* in formulating and applying its three-factor balancing test. See *Lujan*, 67 F.3d at 245-247.

3. In addition to the decisions of the Second, Sixth, and Ninth Circuits, more than 20 district courts have addressed in written decisions the appropriate sanction for a violation of Section 3730(b)(2)'s seal requirement. Most though not all of those district courts have agreed with the Second and Ninth Circuits that violations of Section 3730(b)(2) do not automatically require dismissal of the complaint.[4]

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[4] See Pet. App. 26a-28a (collecting cases). Compare *United States ex rel Stewart* v. *Altech Servs., Inc.*, No. 07-0213, 2010 WL 4806829 (E.D. Wash. Nov. 18, 2010); *United States ex rel. Branch Consultants, L.L.C.* v. *Allstate Ins. Co.*, 668 F. Supp. 2d 780, 803 (E.D. La. 2009); *United States ex rel. Ubl* v. *IIF Data Solutions*, No. 1:06-cv-641, 2009 WL 1254704, at *2-*3 (E.D. Va. May 6, 2009); *United States ex rel. Le Blanc* v. *ITT Indus., Inc.*, 492 F. Supp. 2d 303, 307-308 (S.D.N.Y. 2007); *In re Natural Gas Royalties Qui Tam Litig.*, 467 F. Supp. 2d 1117, 1227-1228 (D. Wyo. 2006); *United States ex rel. King* v. *F.E. Moran, Inc.*, No. 00 C 3877, 2002 WL 2003219, at *13 (N.D. Ill. Aug. 29, 2002), *Burns* v. *Lavender Hill Herb Farm, Inc.*, No. 01-CV-7019, 2002 WL 31513418 (E.D. Pa. Oct. 30, 2002); *United States ex rel. Downy* v. *Corning, Inc.*, 118 F. Supp. 2d 1160, 1163-1164 (D.N.M. 2000);

C. Petitioner's Suit Is Subject To Dismissal On An Alternative Jurisdictional Ground

For the foregoing reasons, the Sixth Circuit erred in treating dismissal as the mandatory sanction for violation of Section 3730(b)(2)'s sealing requirement, and the question presented would warrant this Court's review in an appropriate case. This case, however, is an unsuitable vehicle for resolution of that question because the relator's complaint (at least in substantial part) is subject to dismissal on an alternative jurisdictional ground.

In 2007, a different relator filed an FCA complaint against respondent (among other defendants), making allegations of Medicare fraud similar to those made in this suit. See First Am. Compl., *United States ex rel. Judy Master* v. *LHC Group, Inc., et al.*, No. 07-1117

Castenson v. *City of Harcourt*, 86 F. Supp. 2d 866, 877-78 (N.D. Iowa 2000); *Wisz ex rel. United States* v. *C/HCA Dev., Inc.*, 31 F. Supp. 2d 1068, 1069 (N.D. Ill. 1998); *United States* v. *Fiske*, 968 F. Supp. 1347, 1350-1351 (E.D. Ark. 1997); *United States ex rel. Mikes* v. *Straus*, 931 F. Supp. 248, 259-260 (S.D.N.Y. 1996), *United States ex rel. Kusner* v. *Osteopathic Med. Ctr. of Phila.*, No. 88-9753, 1996 WL 287259, at *5 (E.D. Pa. May 30, 1996); *United States ex rel. Windsor* v. *DynCorp, Inc.*, 895 F. Supp. 844, 848 (E.D. Va. 1995); *United States ex rel. Stinson, Lyons, Gerlin & Bustamonte, P.A.* v. *Blue Cross Blue Shield of Ga., Inc.*, 755 F. Supp. 1040, 1053-1054 (S.D. Ga. 1990) with *Tautz* v. *Obama*, 707 F. Supp. 2d 1, 4 (D.D.C. 2010), *United States ex rel. Maully* v. *Healthsouth Holdings, Inc.*, Nos. 07-2981, 09-483, 2010 WL 149830, *3 (D.N.J. Jan. 15, 2010), *United States ex rel. Fellhoelter* v. *Valley Milk Prod., L.L.C.*, 617 F. Supp. 2d 723, 727-728 (E.D. Tenn. 2008); *Anderson* v. *ITT Indus. Corp.*, No. 1:05-CV-720, 2006 WL 4117030 (E.D. Va. Jan. 11, 2006), *Friedman* v. *F.D.I.C.*, Nos. 93-277, 93-415, 1995 WL 608462, at *3 (E.D. La. Oct. 16, 1995); *Erickson ex rel. United States* v. *American Inst. of Biological Sci.*, 716 F. Supp. 908, 910 (E.D. Va. 1989).

(sealed) (W.D. La. Nov. 29, 2007).[5] The FCA provides that "[w]hen a person brings [a *qui tam* action], no person other than the Government may intervene or bring a related action based on the facts underlying the pending action." 31 U.S.C. 3730(b)(5). Based on its comparison of the complaints filed in the two cases, the government believes that Section 3730(b)(5) likely establishes an independent bar to petitioner's fraud claims.[6]

Although Section 3730(b)(5) is a jurisdictional limit on *qui tam* suits, see, *e.g.*, *Grynberg ex rel. United States* v. *Koch Gateway Pipeline Co.*, 390 F.3d 1276, 1278 (10th Cir. 2004), this Court would have discretion to address the question presented in the certiorari petition without determining whether the first-to-file bar applies, since the question whether violation of Section 3730(b)(2)'s sealing requirement compels dismissal is itself a threshold (albeit non-jurisdictional) issue unrelated to the merits of petitioner's allegations. See *Sinochem Int'l Co* v. *Malaysia Int'l Shipping Corp*, 549 U.S. 422, 430-432 (2007) (holding that a court may dismiss a case on *forum non conveniens* grounds without determining its own jurisdiction). And because no proceedings in this case are pending in the courts below in light of the court of appeals' decision affirming the district court's dismissal, the lower courts will not actually apply the first-to-file bar to petitioner's complaint

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[5] On May 24, 2011, the district court in *United States ex rel Master* granted the government's motion to partially lift the seal in that case so that the government could inform petitioner and this Court of its existence and its relationship to petitioner's FCA suit.

[6] Petitioner's complaint also raises a retaliation claim under 31 U.S.C. 3730(h). Substituted Am. Compl., No. 3 09-0277 (M.D. Tenn. Apr. 23, 2009), at ¶ 5, p. 5. That claim is not subject to Section 3730(b)(5).

while the case is pending before this Court. Nevertheless, in light of the earlier-filed complaint in *United States ex rel. Master*, this Court's resolution of the question presented would not ultimately affect the appropriate disposition of the fraud claims in this case. This case therefore is not an appropriate vehicle for resolution of the question presented.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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